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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____.

VINCENT SERMAN,
LENINE STROLLO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals, Sixth Circuit.

OPINIONS BY COURTS BELOW.

There was no opinion delivered by the United States Court of Appeals, Sixth Circuit. The order of that Court appears at page 32 herein.

The United States District Court for the Northern District of Ohio rendered no opinion. The orders of that Court appear in the appendix to this petition at page 57a.

JURISDICTION.

The order of the United States Court of Appeals, Sixth Circuit, was entered on April 21, 1967; it is set out at page 32 herein. A petition for rehearing was denied on June 1, 1967; that order is set out at page 33 herein.

The petitioners request review of the order by the Court of Appeals affirming an order of the District Court overruling a motion for new trial on the grounds of newly discovered (suppressed) evidence invoking Rule 33 Federal Rules of Criminal Procedure, Title 18 U. S. C. A. Petitioners were sentenced after conviction by a jury on three counts of a six-count indictment, charging them with violation of Section 371 of 18 U. S. C. and Section 472 of 18 U. S. C. The conviction and judgment of the District Court was appealed to and affirmed by the United States Court of Appeals, Sixth Circuit, without opinion. Certiorari was denied by this Honorable Court on October 10, 1965: *Strollo v. United States,* 382 U. S. 873; *Serman v. United States,* 382 U. S. 873. Petitioner Strollo was sentenced to three years on Count I, three years on Count II, three years on Count III and five years probation on Count V, Attorney General's jurisdiction, consecutive. (Count V and the evidence related thereto was not subjected to the motion for new trial.) Petitioner Serman was sentenced to three years on Count I, Attorney General's jurisdiction, five years on Count II and five years on Count III. Petitioner Serman was not indicted in Counts IV, V or VI.

Jurisdiction to review the order of the United States Court of Appeals, Sixth Circuit, is found in Title 28 U. S. C. 1254(1), and Rule 19(b) Supreme Court Rules, Title 28 U. S. C. A.

QUESTIONS PRESENTED.

(1) Whether the Trial Court can summarily overrule a motion for new trial on the grounds of newly discovered evidence when the motion supported by affidavits and a sworn statement taken by a court reporter also requests an oral hearing for the purpose of offering distinct evidence in support of the motion, and where the Government did not controvert the sworn statement or affidavits and made no denial of the facts therein stated.

(2) Whether false testimony relating to the credibility of two Government witnesses in denying any intimation of promise of consideration for testifying favorably for the Government and against these petitioners when, after completion of the trial of these petitioners, the two Government witnesses were immediately placed on probation.

(3) Did not petitioners suffer a violation of their Fifth Amendment rights, Constitution of the United States, to due process of law where facts which would tend to prove innocence being unknown to them at the time of trial were:

(a) suppressed by an investigator while engaged by the Government to ferret out criminal counterfeiting activities, such investigator having testified at the trial;

(b) newly discovered while the case was on appeal and presented to the Trial Court by undisputed affidavits, sworn statement and transcripts of judicial proceedings in support of a motion invoking Rule 33 Federal Rules of Criminal Procedure, Title 18 U. S. C. A., and the Court without hearings or findings denies that motion.

(4) Whether a United States Court of Appeals commits prejudicial error and, therefore, denies due process of law to petitioners, who, by motion, request an order requiring named branches of the Executive Branch of the Federal Government to state, under oath, whether or not petitioners were collectively or separately the subject of electronic eavesdropping or wiretapping when that Court denied the motion without further inquiry:

(a) Should the Court grant such motion when it appears on the pleadings that circumstantial facts support such motion?

(b) In such a case, should the Court take into consideration the meager facilities and investigational facilities available to such petitioners?

(c) In such a case, should the Court take into consideration evasive tactics by Government representatives?

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED.

Constitution of the United States—Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Rule 19(b) Supreme Court Rules, Title 28 U. S. C. A.:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: * * *

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Rule 33 Federal Rules of Criminal Procedure, Title 18 U. S. C. A.:

"The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period."

STATEMENT OF THE CASE.

Petitioners were indicted with two co-defendants, John Paladinich and Robert Armstrong, for conspiracy to defraud and aiding the passing of counterfeit Federal reserve notes as genuine, contrary to Title 18 U. S. C. 371, 472.

Trial was had by jury and the verdict was guilty. Petitioners were sentenced to a total of thirteen years for Serman (Count I, three years; Count II, five years; and Count III, five years), and a total of nine years for Strollo (Count I, three years; Count II, three years; and Count III, three years). The sentences were ordered served consecutively.[1] Petitioners appealed to the United States Court of Appeals for the Sixth Circuit and the judgment of conviction was affirmed without opinion. The petition for rehearing was denied. Petition for certiorari to the United States Supreme Court was denied. *Strollo v. United States,* 382 U. S. 873; *Serman v. United States,* 382 U. S. 873.

John Paladinich, the key Government witness, pleaded guilty at the arraignment proceedings on February 21, 1963; his brother, Joseph, not herein indicted, pleaded guilty to a separate count on the same date. The District Court ordered pre-sentence reports on both to be made. (50a) John Paladinich was set free on a personal $1000.00 bond. (54a) John Paladinich was the only witness at the trial who testified that petitioners were the source of the counterfeit money. Without such testimony, petitioners would have been found not guilty of the counts involved. He testified that on January 3, 1963, he went to

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[1] Petitioner Strollo was placed on probation for five years on a count unrelated to the matter now on appeal.

R. refers to Certified Record; Tr. refers to Transcript of Trial Proceedings; p. __a refers to separate appendix.

the home of petitioner Strollo at 11:00 p.m. (17a); that he met petitioner Serman there (17a); and that he was shown a desk drawer with stacks of the counterfeit money. (17a) There was testimony at the trial by Robert Armstrong, an admitted accomplice of John Paladinich, that the source of the counterfeit money was John Paladinich himself. (27a, 28a) Others testified that neither Serman nor Paladinich were in Strollo's home on the night of January 3, 1963. (25a, 26a) In fact, the evidence at the trial showed that petitioner Serman was an attorney hired to protect Joseph and John Paladinich and appeared for the first time at the Vapors Lounge to discuss the matter with John Paladinich. At this time, John Paladinich paid Serman $150.00.

Armstrong pleaded guilty as charged (R. 42) and he was sentenced to ten years, Attorney General's jurisdiction.

While the case was on appeal, the petitioners continued their search for the truth. As a result of such continued investigation during the months of April and May, 1964, it was discovered that one, Mildred Socie, had information that might be helpful to petitioners. Although Mildred Socie admitted having pertinent knowledge of the counterfeit activities of John Paladinich *and others*, she was reluctant to tell all she knew, due to threats of bodily harm by her husband, Raymond Socie. (34a) Petitioners pursued more diligently this new found avenue toward the truth. Finally, during the month of September, 1965, Mildred Socie disclosed to petitioner Serman that her husband, Raymond Socie, was involved with John Paladinich in the counterfeit activities of a group led by the said John Paladinich. She told of the relationship between Paladinich and Raymond Socie. (37a, 38a) She informed petitioner about a man named "Tom" that Paladinich and Socie went to see in Erie (Pennsylvania) (38a,

39a) and about discussions in her home about "paper and press," and that Paladinich (also known as Jay Denick) (39a, 40a) brought a tool box to her home in December (1962) which was left in her home and in which she looked and saw "green and black bottles" with stuff that looked like "paste" and "plastic plates" (material that she was later informed was useful in producing counterfeit money). (39a, 40a) She said "Jay" (Paladinich) came to her home "right after New Year's Day of 1963," and when Raymond Socie did not come home, "Jay left and later that night * * * left Ray a lot of money." "Jay said this guy didn't roll off too much as he didn't have enough paper." (40a) "Jay said that night he just came from Warren (Ohio) and Ray got mad because he didn't go (with Paladinich)."[2] She related further, that the next day (January 4, 1963) "Jay" (Paladinich) "told me to tell Ray to stay home and don't do anything until he heard from him * * * that his brother was in jail (Joseph Paladinich)."[3] The next day "Jay" (Paladinich) told Raymond Socie that Vince Serman (petitioner) got his brother out of jail. He wanted Raymond Socie to split the $150.00 he paid Vince Serman to get his brother out of jail. (40a)[4] She stated he was told that if the police "ever came around here and asked about Jay * * * to forget Jay ever came here." (41a) She went on to describe later conversations (41a, 42a) and when Raymond Socie told "Jay" (Paladinich) all he had was

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[2] This relates exactly in time with Robert Armstrong's testimony at the trial that he accompanied John Paladinich (Jay) to Warren, Ohio, to pick up the finished product—the counterfeit money. (27a, 28a)

[3] Brother of "Jay" (Paladinich). Was arrested in Warren, Ohio, on January 4, 1963.

[4] Petitioners Serman and Strollo testified at the trial that on the afternoon of January 4, 1963 "Jay" (Paladinich) gave Vince Serman money at the "Vapors Lounge." (Tr. 892, 893; 910 ll. 19-25; 911 ll. 18-25; 912 ll. 8, 14-25.)

"queer" to help pay for Vince Serman's services, "Jay" (Paladinich) jumped up and said, "you mean you didn't get rid of all of it?"

Mrs. Socie went on to relate how the police came: "Mr. Bernat * * * showed me Ray's statement and asked me to read it * * * Mr. Bernat handed (her) (the statement) to read * * * (42a)[5] he (Bernat) asked me to sign it * * * but I did not because Ray said no * * *." (43a) "Ray came home one day and said we had to move as the trial is coming up * * * so we moved over to the west side * * *." (43a)

Petitioners urged Mrs. Socie to give her statement in writing and she finally consented. At this time, petitioners made immediate arrangement for a court reporter (September 29, 1965) and the statement was made under oath. (35a)

Raymond Socie absconded from the jurisdiction and by means of two letters and two telephone conversations with Mrs. Socie, made it known clearly the reasons for leaving. (34a, 44a, 45a) He stated in his letter of September 18, 1965,[6] "* * * you know Bernat has my confession * * *." (44a) A letter *received after* Mrs. Socie gave her sworn statement (the sworn statement was given on September 29, 1965; the letter was post-marked September 28, 1965, but received two days later) shows where Raymond Socie erroneously believed that Bernat ("B * * * has that paper you signed.") had secured the signature of

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[5] Bernat, the detective first on the scene when Joseph Paladinich was arrested on January 4, 1963; He testified at the trial of this case. (Tr. 287-294; Tr. 1039) He was usually present at all conferences with John Paladinich, e.g., 20a.

[6] The showing of this letter to petitioner Serman served to increase efforts at that time to get a sworn statement from Mrs. Socie; that letter was in the possession of Mrs. Socie's attorney, a Mr. M. Kosach, of Youngstown, Ohio.

Mrs. Socie on the statement which is now the subject of the suppressed evidence complained about in petitioners' motions. (45a) In that same letter he threatens also to write to "Judge Diamond[7] in Cleveland, and tell him if "B" (Bernat) does not keep his promise * * *." (45a)

Great effort had been made by petitioners to locate Raymond Socie with hope of compelling his attendance as a witness or to obtain his affidavit. All efforts were without success.

Petitioner Serman prepared immediately to file his motion under Rule 33 Federal Rules of Criminal Procedure, Title 28 U. S. C. A., while the appeal was pending before the Supreme Court, and at least one conference was had with the United States Attorney on the matter. On October 10, 1965, the Supreme Court announced denial of certiorari to the petitioners, and on October 15, 1965, petitioner filed the first motion (R. 129) with memorandum (R. 130) and affidavits of Clinton, Serman and Gentile (R. 130) and stated the most important of affidavits would be withheld, but would be filed "at the very earliest conference." (See page 6 at R. 130) This motion was followed by the motion of petitioner Strollo on October 28, 1965 (R. 131), and all affidavits and sworn statements (including Mildred Socie's sworn statement) were made a part of the motion. (R. 131)

The Government representatives did not file counter-affidavits, deny the allegations and offers of proof or in any manner contest the issues before the United States District Court. Thereafter (December 10, 1965), the Court overruled the motions for new trial without hearings (57a) (R. 133) and without findings, although, in addition to the affidavits, sworn statements and allegations

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[7] Charles Diamond, then an Assistant United States Attorney, and one of the lawyers in charge of prosecution of the instant case (not then or now a judge).

contained in the motions, transcripts of proceedings had on the matter of favoritism and considerations granted the Paladinich brothers were before the court also. (50a, Cr., 63-39, Joseph Paladinich; 51a, Cr., 63-50, the arraignment of all parties; 55a, Cr., 63-39 and 63-50, the matter of placing the Paladinich brothers on probation.)

Petitioners appealed to the United States Court of Appeals, Sixth Circuit. (58a, 59a) The order of the District Court was affirmed without opinion (page 32 herein). A petition for rehearing was denied on June 1, 1967 (page 33 herein), and motions to determine whether or not petitioners were the subject of electronic eavesdropping and telephone surveillance were also per curiam denied.[8] The Court of Appeals entered an order to stay the mandate pending appeal to the United States Supreme Court on June 15, 1967 (cf. Rule 24(3), Title 28 U. S. C. A.)

REASONS FOR GRANTING WRIT OF CERTIORARI.

1.

The overruling of the motions of the petitioners for a new trial on the grounds of newly discovered evidence summarily and without counter affidavits or denial of any kind by the Government, and without a requested oral hearing so that distinct and proper evidence could be introduced in support of the motions, is contrary to all laws of decency.

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[8] The motion was filed on March 19, 1967; the Government responded on April 3, 1967; petitioners filed a memorandum on May 11, 1967, setting out circumstantial *aliunde* facts on the matter; the Government evaded this by filing a memorandum with affidavits of (1) Agent Deckard, who was not involved during the investigation of this case (this is apparent on the face of the affidavit). (2) Agent Dobeck who speaks in his affidavit of "counterfeit activities in 1962, and 1963" when the matter here was under investigation from January 4, 1963, through February 1, 1963.

The affidavits and sworn statements supporting the motions raise grave charges that a detective investigating the charges in this case, before indictment, knew that the source of the counterfeit money was not these petitioners. The sworn statement names this detective in the City of Youngstown, Ohio, as Gerald Bernat. This named detective was on the investigation from the beginning to the end, and testified at the trial against these petitioners. However, he did not divulge the facts he had investigated and that he had found Raymond Socie and John Paladinich were the source of the counterfeit money, which fact was testified to at the trial by Robert Armstrong. (Appendix 27a, 28a)

This is not a case of a recanting witness or some other farfetched theory. Here the sworn statement sets out facts that go to the heart of the charges on which these petitioners were convicted, namely, the source of the counterfeit money.

This Court has approved affidavits to support motions for new trial and for other purposes. *Taylor v. Riggs,* 7 U. S. 713 (1827). In the case of *Neal v. Delaware,* 103 U. S. 370 (1881), an affidavit in support of a motion, uncontradicted by counter affidavit, was upheld, but in that case the prosecution did not object on hearings. However, when the affidavits in a case involve grave charges of fraud, this Court, in *Suroivitz v. United States,* 383 U. S. 363 (1966), in a stockholders' derivative suit where the District Court summarily dismissed the suit and the Court of Appeals approved despite the fact that affidavits had been filed explaining pre-investigation in the case, observed that:

> "We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss without any answer or argument at all, cases

like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion."

In the instant case, though Raymond Socie, the man whom Detective Bernat questioned relative to the source of counterfeit money, has left this jurisdiction and his whereabouts are unknown, Detective Bernat never left this jurisdiction. He is still here, and no reason has ever been given for his continued silence, though he well knows that the unexplained charges in the sworn statement filed are such that taint not only his investigation of this case, but his testimony as well. His silence is the silence of the Government. In *Remmer v. United States*, 347 U. S. 227, 229 (1954), in which there was a motion for new trial supported by affidavit and a hearing requested, and the Government did not file answering affidavits, the Court observed:

"The trial court should not decide and take final action ex parte on information such as was received in this case * * *."

This Court, in the year 1964, passed on the question of the necessity of a defendant being given an opportunity to introduce evidence to support the allegations of a motion for new trial. In *Coleman v. Alabama*, 377 U. S. 129, 133, a motion for new trial was filed, supported by an affidavit of appellant's mother that her son (colored) was indicted by a grand jury and tried by a jury of exclusively white men. The Supreme Court of Alabama refused to grant a new trial, stating that no evidence was introduced other than the mother's affidavit. Justice Clark, after noting that the appellant was not permitted to offer evi-

dence to support his claim, speaking for a unanimous Supreme Court, said, quoting from the case of *Carter v. Texas,* 177 U. S. 442:

> "* * * this Court must reverse on the ground that the defendant 'offered to introduce witnesses to prove the allegations * * * and the court * * * declined to hear any evidence upon the subject * * *.'"

At 448-449:

> "In light of these considerations, the petitioner is now entitled to have his day in court on his allegations of systematic exclusion of Negroes from the grand and petit juries sitting in his case. The judgment is therefore reversed and the case remanded to the Supreme Court of Alabama for further proceedings not inconsistent with this opinion."

In 1962, the Supreme Court of the United States, in the case of *Mitchell v. United States,* 368 U. S. 439, wherein the newly discovered evidence in a motion for new trial consisted of an affidavit stating that in a line-up, a witness positively identified a suspect, whereas, at the trial the witness testified his identification was not positive. The motion was denied without a hearing in the United States District Court, which order was affirmed by the Court of Appeals. This Court said:

> "* * * remanded to the District Court for a hearing upon petitioner's motion for a new trial on the grounds of newly discovered evidence."

The overruling of the motions for new trial by the District Court and the affirmance thereof by the Court of Appeals does violence to Rule 33 Federal Rules of Criminal Procedure and the Constitution of the United States, Amendment V.

2.

At the trial of these petitioners, John Paladinich and his brother, Joseph Paladinich, testified for the Government. The sworn statement in question one in this petition states that John Paladinich was the source of supply of the counterfeit money. The sequence of events involving John Paladinich before, during and after the trial of these petitioners, is as follows:

(a) was interrogated on February 8, 1963, or February 9, 1963;

(b) gave a statement admitting his nefarious dealings in counterfeit money;

(c) was not arrested;

(d) was not placed under bond;

(e) was indicted on February 15, 1963, with the petitioners in this case;

(f) was arraigned on the indictment February 21, 1963, waived counsel and entered a plea of guilty;

(g) was released on personal bond;

(h) testified in July, 1963, that these petitioners were the source of the counterfeit money that he, his brother and friends passed;

(i) testified in July, 1963, that he would not be granted any favors for testifying for the Government;

(j) on September 20, 1963, in open court before the Honorable Ben Green, was placed on probation after an Assistant United States Attorney notified the court that the investigating agency, the Secret Service Department, recommended probation; and (App. 55a, 56a)

(k) was never deprived of his freedom for one moment.

The petitioners, through no fault of their own, have been unable to elicit the actual promise of consideration for the testimony. But surely one cannot overlook what actually happened. Two indispensable Government witnesses had been induced by hope held out by the Government that their cooperation would be considered by the court and they would be placed on probation. *Hawkins v. United States,* 334 Fed. 2nd 873, 878:

> "At the time these witnesses so testified, the Government must be charged with knowledge that their testimony was false."

This present case arose in Youngstown, Ohio, at the time that the former Attorney General, Robert Kennedy, had ordered all Government investigative agencies into that city. One of the petitioners herein, Vincent Serman, an attorney, was at that time counsel for many of the people under the investigation ordered by the Attorney General. Petitioner, Lenine Strollo, was a very close friend and client of Vincent Serman.

This Court said in *Mooney v. Holohan,* 294 U. S. 103, 112:

> "* * * if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

This Court also said in *Mesarosh v. United States,* 352 U. S. 1, 9:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testi-

mony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial."

The Government does not deny that the Assistant United States Attorney, at the session on September 20, 1963, for the imposition of sentence (Appendix 55a, 56a) of John Paladinich and Joseph Paladinich said with reference to the Secret Service Department:

"They have advised me to tell the court they recommend probation for these two men."

The above quote positively shows that a Government agency knew that John Paladinich and Joseph Paladinich were committing perjury when they stated they were not to be given consideration. *Smith v. United States,* 259 Fed. 2d 125.

If the jurors knew that John Paladinich and his brother, Joseph Paladinich, were not telling the truth when they said they were not to receive any consideration for their testimony, the jurors surely would have realized that the same two men lied when they said the petitioners were the source of the counterfeit money.

This Court, in *Napue v. Illinois,* 360 U. S. 264, 269, 270, said:

"Had the jury been apprised of the true facts, however, it might well have concluded that Hamer had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which Hamer was testifying, for Hamer might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration."

"* * * a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does

not cease to apply merely because the false testimony goes only to the credibility of the witness."

In the same *Napue* case, this Court quotes from a New York case, *People v. Savvides*, 136 N. E. 2d 853, 854, 855:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth * * *. That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

The testimony of the key witness, Paladinich, is not only false when the newly discovered evidence is brought into this matter, but on the record, on its face, the testimony is "tainted." It is loaded with reason for bias. He was an alleged accomplice. Such testimony must be regarded with suspicion, *Surratt v. United States*, 269 Fed. 2d 240, C. A. D. C. (1959) from the start and must be received and considered with caution; *Williams v. United States*, 308 Fed. 2d 664, CA Cal. (1962). Hence the moment that Paladinich indicated his alleged accomplice character, his credibility was under attack. *Colt v. United States*, 160 Fed. 2d 650, CA Fla. (1947).

The conviction of petitioners on Counts I, II and III are "tainted" and could not stand the light of a new trial.

3.

In the instant case we observe the abridgment of petitioners' right to due process of law in that they shall be imprisoned by verdict and judgment tainted by suppressed evidence.

The trial of cases in federal and state courts must be fair. If the trial be tainted by suppressed facts, it is unfair and repugnant to the due process concept.

A true verdict is not possible where evidence, which is in some degree material, is suppressed and, therefore, not considered by the trier of fact. The judiciary should look upon suppressed evidence with great disfavor, for a trial is and should be a search for the truth, when the parties are legitimately at odds as to what the truth really is. The courtroom is not and should not become an arena for a game of wits and skill. This must be true where the great prestige, weight and force of the Government is brought to focus upon the accused. No one can doubt that the resources of a Government are vast when compared with the resources of the accused.

If the suppression of evidence is repugnant to the fair trial and due process concept, it cannot be treated as harmless error when attacked, if the test pronounced by this Court as a "Federal Harmless Error Test" for state and federal courts alike is applied. The suppression of evidence per se gives rise to a "reasonable possibility of prejudice" to the accused. (Cf. *Fahy v. Connecticut*, 375 U. S. 85 (1963); see also *United States v. Redfield*, DC Nev., 197 F. S. 559, aff'd, 295 Fed. 249, cert. denied, 369 U. S. 803, 7 L. ed. 2d 550.

When the trial court was notified by motion properly supported with newly discovered evidence the record should have been perused and other factors affecting the outcome of the trial taken into consideration:

(a) the various errors affecting the outcome even though such may have been previously treated.[9]

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[9] *Strollo v. United States*, 382 U. S. 873 and *Serman v. United States*, 382 U. S. 873, certiorari denied.

(b) was the evidence as presented in Counts I, II and III "close."

(c) in considering the evidence, the posture of the key government witness (without his testimony conviction is not possible):

(1) he was an alleged accomplice,

(2) a convicted felon and an admitted counterfeiter, jail breaker dishonorably discharged from the United States Army,

(3) was granted favoritism by the investigatory forces in this case,

(4) (See p. 15, *supra.*)

Newly discovered evidence must relate to the issues and must be potentially capable of changing the result. 24 *Corpus Juris Secundum* 198. When in a case such as the instant case, the evidence barely justifies any verdict, a new trial should be ordered.[10] Hence where the newly discovered evidence is considered in the light of other trial testimony and the errors that affected the outcome of the trial, it should be given great weight in a new trial. 24 *Corpus Juris Secundum* 220, 221, 222.

A clearly defined Suppressed Evidence Doctrine must be effectuated. The status of this very important area of criminal law is in doubt when the lower court cases are perused; none clearly define a fair rule of law to implement Rule 33 F. R. C. P. Thus far, the cases are dealt with on an ad hoc basis with very little success in reducing the in-

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[10] The main thrust of the Government's case here was the testimony of John Paladinich that he saw counterfeit money in the basement of Strollo's home, and that Serman was present at the time. Trial testimony by the defense refuted that; Tr. 724-743, Robert Armstrong testified he accompanied Paladinich when the "finished product" was ready, and that at no time was he or Paladinich in the home of Strollo on the night of January 3, 1963. This testimony is well supported by the newly discovered evidence. Appendix 40a.

cidence of suppression cases. The total effect the evidence would have in "changing the result" seems to be the only test uniformly applied.

On one side of the coin, if the newly discovered evidence be weak (the trial court having made exhaustive findings) in relation to its potential for changing the result, we find one extreme of the application of Rule 33; *Johnson v. United States,* 327 U. S. 106 (1946). On the other side of the coin, if the finding is that diligence is slight, the motive of the prosecutor is unquestionable and there has not been a specific *request* for the evidence at pre-trial, we have the other extreme; *United States v. Consolidated Laundries Corp.,* 291 Fed.2d 563. There is no particular "middle" ground. The doctrine to be desired is one that should clearly define itself in such a way so as to secure the accused a fair trial, a concept usually measured by ascertaining the amount of *harm* occasioned by the suppression of the evidence in question.

The "Larrison Rule" (*Larrison v. United States,* CA 7, 24 Fed.2d 82) announced that a new trial should be granted where the court is *reasonably satisfied* that the testimony given by a material witness is false and that without it the jury *might* have reached a different conclusion. The party must be taken by surprise and not able to meet the false testimony, and did not discover the falsity until after the trial.[11] However, this notion presupposes that the accused is well informed at the pre-trial stages; it indicates that he has intimate knowledge of the facts, and puts him at or near the scene of the crime. If he is innocent, then he *knows* the testimony against him is false and he must helplessly stand by as the testimony unfolds. He then attacks that testimony by saying that

[11] Larrison involved "recantation" by a material witness.

it is not true; otherwise, he must *prove* his innocence. The latter is inconsistent with our system of jurisprudence. The notion that the court must be reasonably satisfied of the falsity likewise assails a fixed and defined rule that the jury be the judges of the facts.

In *Brady v. Maryland*, 373 U. S. 83 (1963) we find the lead case dealing with suppression of material evidence *requested* by the accused. But here again we must consider that the need for suppressed evidence is greatest when a request for it is not possible due to ignorance of the matter asserted by the prosecution.[12] We do not think this Court announced *Brady* as a base for requiring a *request* for specific evidence, since the court approved *Pyle v. Kansas*, 317 U. S. 213 (1942), and *Mooney v. Holohan*, 294 U. S. 103 (1935). (See also *United States ex rel. Thompson v. Dye*, 221 Fed. 2d 763, CA 3, 1955, and *Almedia v. Baldi*, 195 Fed. 2d 815, CA 3, 1952.) None of the cases from *Pyle* through *Almedia* enunciate a *request* requirement. Rather, a failure to disclose voluntarily, evidence in those cases was held to be violative of due process. Thus, we find that suppression of evidence reaches constitutional proportions because it renders fair trial impossible and the *harm* suffered by the accused would require granting a new trial.[13]

Hence we come to focus on the term "vital" evidence. Such evidence would conceivably be defined as of highly

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[12] In the instant case petitioners moved for a Bill of Particulars (R. 19). It was partially sustained; (R. 25) however, the Government's bill misled the petitioners on the most important matter of time, i.e. the incident in Strollo's basement. The newly discovered evidence applies here also. The Government set the incident out as the night of January 2, 1963 (23a); the indictment also set the same time. Paladinich testified at trial that the incident took place on the night of January 3, 1963 (Appendix 16a, 21a, 23a).

[13] See *United States, ex rel. Thompson v. Dye*, 221 Fed. 2d 763 (1955).

probative value—evidence that would be given some weight by a jury and considered admissible for that purpose. Thus, where the police had knowledge of the prior promiscuous demeanor of the prosecutrix and suppressed such knowledge, it may result in an unfair trial. Such unfairness may be measured by the amount of harm to the accused, and thus become the basis for a violation of due process (cf. *Giles v. State,* 212 A.2d 101, Myd.).[14] We must here observe that nearly without exception suppression cases have been reversed on the ground that the accused was denied due process.

In *Smallwood v. Warden,* 205 F.2d 325, decided in 1962, the court dealt with "vital" evidence. In 1950, the Circuit Court for the District of Columbia announced a test of "useful" and "admissible" evidence. The suppression of such evidence, i.e., that deceased had his hand in his pocket which contained an open penknife, was a denial of due process, although the claim of self-defense was refuted by several witnesses during the trial. *Griffin v. United States,* 183 F.2d 990 (DCCA 1950). The Third Circuit took the view that withholding information which would have been "helpful" in the preparation of the defense was a violation of due process. *United States, ex rel. Butler v. Maroney,* 319 F. 2d 622 (CA 3, 1963). A year later, the Second Circuit announced that the failure to furnish knowledge of an eye witness favorable to the accused, without request, was a denial of due process. *United States, ex rel. Meers v. Wilkins,* 326 F.2d 135 (CA 2, 1964). The case was one where two witnesses said the accused was not the robber, when they viewed him in a lineup. However, the prosecution called witnesses

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[14] See also *Smallwood v. Warden,* 205 F. S. 325, DC Myd., 1962; "vital" evidence of promiscuity suppressed in a rape conviction.

who did identify the accused at the trial. The court found this *might* have raised the question of *reasonable doubt*.[15]

Levin v. United States, 338 F.2d 265 (D. C. C. A. 1964) cert. denied 379 U. S. 999 (1965) is seemingly to be the first case granting relief where the prosecutor's conduct was unquestionable, the defense counsel's *lack* of diligence so extreme and the evidence's prejudicial effect so dubious it is unprecedented. In the instant case, there is evidence of the prosecutor's knowledge; the prejudicial effect is obvious (the prosecutor did not even attempt to oppose) and counsel was as diligent as conditions would permit (considering the speedy trial method used here).

Absent unfair conduct and given the use of the newly discovered evidence, a verdict of acquittal is without question the result to be obtained.

The failure to disclose in a factual situation such as this is a denial of petitioners' Fifth Amendment right to due process of law.

In the instant case, the District Court summarily overruled the motions without further inquiry. Petitioners were thereby foreclosed from the use of compulsory process to present "live" testimony to pursue their cause. If it be said that the District Court "found" the evidence was not such that the jury might come to a different conclusion, we suggest that such is a usurpation of the jury fact finding function. The denial of a jury trial by means of a directed verdict. We do not think under the circumstances of this case the "Larrison Rule" can be applied. It not only differs on facts (recantation) but it differs in principle. Larrison speaks of the trial judge being "rea-

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[15] Cf. *United States v. Consolidated Laundries Corporation*, 291 F. 2d 563 (1961) where the Second Circuit held that the "negligent" suppression of evidence could require a new trial, depending upon the amount of "harm" suffered by the accused. (To the same effect, *Kyle v. Kansas*, 297 F. 2d 507 (CA 2)).

sonably satisfied" that the witness' testimony was false. Clearly, in this case, this is a jury question. The judge must be a neutral arbiter, not a defense or prosecution strategist.

It should be noted that the subsequent evidence of a fact supports the inference of its earlier existence when the subsequent condition would not ordinarily exist absent earlier existence of the fact. 2 *Wigmore Evidence,* Section 437; *Russell Poling Co. v. Conners Standard Marine Co.,* 252 F.2d 167 (C. A. 2d 1958). See also *Curran v. State of Delaware,* 259 F.2d 707 (C. A. Delaware 1958).

The affidavits and sworn statement should be construed favorably to the petitioners. Ambiguities should not be resolved favorably to the Government without inquiry of the proposed witnesses. *Hamilton v. United States,* 140 F.2d 679, DC Appls. (1944).

In the instant case, neither the prosecution nor the investigatory forces denied the existence of the matter asserted by motions, memorandums, supplemental motions, supporting affidavits, sworn statement and transcripts of judicial proceedings. In *Richardson v. United States,* 360 F. 2d 366, CA Ala. (1966), where on a motion for new trial facts and allegations showed a witness to have engaged in private conversation with a juror and no hearing was held on the motion, it stood as *confessed;* prejudice would be *assumed* in the form of a *rebuttable presumption.*

The harm suffered and the prejudice that resulted had their beginning sometime after the date of arrest of the accused (February 11, 1963) and prior to indictment (February 15, 1963).

This Court, in the *Brady* case, focused upon prejudice to the defendant as opposed to some degree of duty of culpability by the prosecution. However, we do not find

where this high Court has directly passed on the duty to disclose, without request, evidence favorable, vital, admissible and helpful to the accused. In the *Brady* case, the Court held that suppression of evidence *favorable* to the accused violates due process, whether such evidence goes to guilt or punishment, and without measure of the *good or bad faith of the prosecutor*. Thus, when the prosecution forces, bolstered with armadas of manpower, nearly unlimited funds and, in this day, a favorable press bombarding the accused from the date of arrest and throughout the trial with unfavorable comment (i.e. *Sheppard v. Maxwell,* 384 U. S. 333 (1964)), they aggravate the accused's lack of ability to obtain evidence, and when they further aggravate by not revealing to him material evidence, the Constitution is violated.

In the light of recent Supreme Court decisions, suppression of evidence by officials of Government leaves the only door left open to official lawlessness. The quest for truth in our judicial system cannot yield to the temptation of being reduced to a sporting event. The prosecution has a duty to seek justice, regardless of the merits of the case. In *Berger v. United States,* 295 U. S. 78 (1935), this Honorable Court held that it was repugnant to due process for a prosecutor to introduce only evidence of defendant's guilt while concealing evidence in his favor. The rule should include official investigatory forces employed by the state or federal government. The need for articulation is great, since the Courts of Appeals seem wide afield on a general area of application of Rule 33 F. R. Cr. P. in newly discovered evidence and suppression cases.[16] We

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[16] Three areas require study: (1) May the suppression of evidence which might reasonably lead to discovery of admissible evidence work a denial of due process? (2) To what extent should the prosecution be charged with knowledge of relevant information in the possession of other governmental agencies? (3) Must there be a request by the accused before suppression will be found to violate due process?

submit that the instant case presents factually the basis for a full scale investigation by this Honorable Court of the principles requiring regulatory application as opposed to a case by case (ad hoc) application of varied principles. It should not be essential that the new proof would likely produce an acquittal. It should suffice if it would in all probability raise reasonable doubt as to guilt of the accused within the degree of culpability of which the jury finds him guilty.[17] Where the case is a close one, denials of accused's motion may work a hardship as well as a possible miscarriage of justice, especially where the newly discovered evidence is not strictly cumulative, but contradicts the strongest evidence introduced against the accused.[18]

4.

On March 29, 1967, petitioners filed a motion in the United States Court of Appeals, Sixth Circuit, with memorandum,[19] praying the Court issue an order requiring the following branches of the Executive Department of the Federal Government to examine their files and report, under oath, whether these petitioners were subjected to eavesdropping and/or wiretapping:

(a) The United States Treasury Department;

(b) The United States Department of Justice;

(c) Secret Service Division of the United States Treasury Department; and

(d) Any other branch of the Executive Department.

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[17] E.g. *Davis v. State*, 18 So. Rep. 2d 282.

[18] E.g. *People v. Gilbert*, 145 Pacific 2d 924.

[19] The pleadings involved on this question are not part of the certified record. The Clerk of the Court of Appeals will be asked to forward same to the Supreme Court. The pleadings are set out in chronological order at pages 33 to 52 herein for this Court's convenience at this time.

Circumstantial facts were presented by means of a memorandum filed with the motion. (pp. 34-35, appendix) On April 3, 1967, the respondent filed an opposite memorandum by an assistant United States Attorney and appended an affidavit (his own) stating inquiry was made of the Secret Service and that petitioners were not the subject of such surveillance.[20]

On April 21, 1967, the Court denied the motion by petitioners "in view of the affidavit supplied by the Assistant United States Attorney and because no supporting facts are set forth in said motion." (See Court's Order page 32 herein.) On May 11, 1967, petitioners filed another motion in an attempt to inform the Court of additional *aliunde* circumstantial facts (p. 36, appendix):

> (a) that other agencies were the subject of inquiry, as well as the Secret Service;
>
> (b) that police files would show some light on the subject;
>
> (c) that the area of Youngstown, Ohio, was the object of an invasion by numerous Justice Department agents from 1961 through 1965, and at least some of these "agents" were specialized in electronic surveillance practices;
>
> (d) that the Department of Justice had admitted electronic surveillance in two other cases in that area[21] and such surveillance took place at times not so remote from the times these petitioners were under investigation.[22]

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[20] This particular attorney was not trial counsel in this case. Such counsel resigned thirty days after the instant trial was concluded.

[21] *Carabbia v. United States*, Sixth Circuit No. 17011; *DeNiro v. United States*, Sixth Circuit No. 17053.

[22] In the *Carabbia* case, the Department, speaking through Fred M. Vinson, Jr., Esquire (Criminal Division), lodged with the Court of Appeals, Sixth Circuit, a memorandum admitting

(e) a partial list of persons believed to have some knowledge of the circumstances was included;

(f) that Federal Bureau of Investigation agents were on the premises under the control of Attorney Vincent Serman (petitioner herein) at unauthorized times;

(g) that a telephone wire extension was found on the premises that connected to 9 Front Street, Youngstown, Ohio (local F. B. I. offices); (April 13, 1962);

(h) that organized crime offices were used to interrogate the key Government witness, John Paladinich, and also such agents took part in physical surveillance of petitioners and at least one such agent testified at the trial of this case. (Appendix pp. 37-38 f. n. 4)

In that memorandum, the Court was asked to recall that *O'Brien v. United States,* ____ U. S. ____; 87 S. Ct. __ (1966), 18 L. ed. 2d 94, came out of the Sixth Circuit[23] and that there was reason to believe that the attorney-client relationship had been violated. (*Black v. United States,* 385 U. S. 26 (1966).)

On May 18, 1967, the Assistant United States Attorney suggested this case was pending too long; he submitted a memorandum with two affidavits (each to the effect that petitioners were not subjected to electronic surveillance). Such affiants are presumed to be the same agents he "inquired of" as stated in the previous memorandum. However, significantly:

(Continued from preceding page)

trespass upon the premises and the placing of a microphone upon premises apparently controlled by Carabbia on January 22, 1962, where it so remained until March 22, 1962, and that logs were kept of conversations overheard.

[23] In all, there are six cases in the Sixth Circuit on the subject of eavesdropping at the present time.

(a) Agent Deckard did not come to the Cleveland area until February 4, 1963. The investigation of this case started January 4, 1963, and ended on or about February 1, 1963;

(b) Agent Dobeck spoke of participating in the investigation of these petitioners in 1962.[24]

On June 1, 1967, the Court of Appeals denied petitioners' petition for rehearing. Such denial included the matter of an order requiring respondent to respond to the original motion with the after-supplied circumstantial facts (page 33 herein).

If respondent, or any of its agencies, subjected petitioners to electronic surveillance or telephone wiretapping, the right and privilege of the attorney-client relationship was invaded. *Black v. United States,* 385 U. S. 26 (1966). A determination could have been made by the Court of Appeals after requiring respondent to disclose. The Court would have been in position then to make a decision based on *Black, Schipani v. United States* (October Term 1966 No. 504) or *O'Brien v. United States* (____ U. S. ____; 87 S. C. ____; 18 L. ed. 2d 94, 1967).

Petitioners pray this Honorable Court review because of the importance of this issue in the proper administration of justice in criminal proceedings (Rule 19(b); Rules, United States Supreme Court).

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[24] During the trial, witness, Armstrong, testified that he was involved with the Paladinich brothers, the key witnesses, as far back as March or April of 1961 (Tr. 719). The Paladinich brothers denied even knowing him then.

CONCLUSION.

Petitioners submit that the affirmance of the order of the United States District Court by the United States Court of Appeals, Sixth Circuit, in view of the Constitutional requirements and the Rules of Criminal Procedure here involved, denied the petitioners due process of law.

Petitioners urge that the due process concept applies the moment one is accused of crime. The withholding of evidence that tends to prove innocence is a violation of due process. The Rules of Criminal Procedure are designed to afford one accused of crime, justice, in the preparation, trial and appeal of the case. A departure from the principles of "fair trial" or "fair play" in the entire conduct of a case gives rise to the need for review because of the importance of proper administration of justice in Federal Courts.

In view of the questions presented we respectfully pray that a writ of certiorari issue from this Court to the United States Court of Appeals, Sixth Circuit, and that petitioners be granted leave to present these matters on the merits.

Respectfully submitted,

VINCENT SERMAN,
LENINE STROLLO,
Petitioners Pro Se.

DAN W. DUFFY,
1030 National City-East 6th Building,
Cleveland, Ohio,

JOHN J. KANE, JR.,
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JOHN A. WIETHE,
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Cincinnati, Ohio.

APPENDIX.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed April 21, 1967.)

Before WEICK, Chief Judge, CECIL, Senior Circuit Judge, and MILLER, Senior Circuit Judge.*

Upon consideration, we find that the District Judge did not abuse his discretion in denying the motion for a new trial on newly discovered evidence. The order denying the said motion for a new trial is therefore affirmed.

The motion to require the Treasury Department and the Department of Justice to examine their files to determine whether in connection with the investigation and prosecution of Appellants electronic eavesdropping or wiretapping was used and, if so, to report to this Court, is denied in view of the affidavit supplied by the Assistant United States Attorney and because no supporting facts are set forth in said motion.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

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* Honorable Wilbur K. Miller, Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed June 1, 1967.)

Before WEICK, Chief Judge, CECIL, Senior Circuit Judge, and MILLER, Senior Circuit Judge.*

Upon consideration of the petition for rehearing including the document labeled "Joint Remonstrance of Defendants-Appellants Against Response to Motion with Affidavit by the Government on Determination of Existence of Electronic Surveillance" and the Motion, Memorandum and affidavits submitted by the Government in opposition thereto, it is ORDERED that said petition for rehearing be and it is hereby denied.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

MOTION AND MEMORANDUM.

(Filed in the United States Court of Appeals for the Sixth Circuit March 29, 1967.)

Now come the defendants-appellants, Vincent Serman and Lenine Strollo, by and through their counsel, Dan W. Duffy and John J. Kane, Jr., and respectfully move this Honorable Court of Appeals for an order requiring the United States Treasury Department and the United States Department of Justice to examine their files in connection

* Honorable Wilbur K. Miller, Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

with the investigation and prosecution of the above action, to determine whether the defendants-appellants collectively or separately have been subject to electronic eavesdropping or wire tapping by either representatives of the United States Department of Justice or the Secret Service Division of the United States Treasury Department or any other agency of the Executive Branch of the United States Government, and report to this United States Court of Appeals, whether there has been any such invasion of privacy in violation of the Constitution of the United States.

JOHN J. KANE, JR.,
DAN W. DUFFY,
Attorneys for Defendants-Appellants.

MEMORANDUM.

As grounds for this motion, the defendants-appellants respectfully show this Honorable Court of Appeals that prior to, at the time of, and after the Grand Jury investigation that led to the indictment of the defendants-appellants in the present case, and prior to the trial of this case, at the request of the then Attorney General of the United States, the above agencies of the Government were ordered into Youngstown, Ohio, to clean it up. That electronic surveillance was used in the investigation into crime in the Youngstown, Ohio, area, has been acknowledged by the United States Department of Justice in the following cases now pending before this Honorable Court of Appeals:

(1) No. 17,011—United States vs. Ronald Carabbia
(2) No. 17,053—United States vs. Frank DeNiro, Jr.
(3) No. 17,054—United States vs. Michael DeNiro
(4) No. 17,055—United States vs. Louis DeNiro

In one other case considered by this Honorable Court of Appeals (but wherein fact of electronic eavesdropping was not brought to the attention of this Court when the case was before it) on Certiorari to the Supreme Court of the United States in *O'Brien v. United States,* 35 Law Week, 3329, the Supreme Court, on being informed of the use of electronic eavesdropping, in a Per Curiam order remanded the case "for a new trial should the Government seek to prosecute petitioner anew. *Black v. United States,* 385 U. S. 26."

The admitted and indiscriminate use of electronic eavesdropping and wire tapping by investigative agencies of the United States Government, and the widespread use of the same in the Youngstown, Ohio, area, constitute an invasion of privacy and violation of the constitutional rights of each and every individual indicted and prosecuted as a result of electronic surveillance and wire tapping.

Up to this day, the Department of Justice has admitted fourteen (14) instances of electronic eavesdropping in cases during the last year, and about thirty-six percent (36%) of those cases are now pending in this Sixth Circuit.

Respectfully submitted,
JOHN J. KANE, JR.,
DAN W. DUFFY,
Attorneys for Defendants-Appellants.

Certificate of Service.

Copy of the within motion and memorandum was mailed this 28th day of March, 1967, to the Honorable Merle M. McCurdy, United States Attorney, 400 Federal Building, Cleveland, Ohio, 44114.

JOHN J. KANE, JR.,
Attorney for Defendants-Appellants.

MOTION ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

(Filed in United States Court of Appeals for the Sixth Circuit May 11, 1967.)

Joint Remonstrance of Defendants-Appellants Against Response to Motion With Affidavit by the Government on Determination of Existence of Electronic Surveillance.

The defendants-appellants request leave of the Honorable Court to consider the following as responsive to the response filed by the United States Attorney on March 31, 1967.

The defendants-appellants filed a motion to require the United States to report to the Court as to whether the following branches of the Executive Department employed the use of electronic surveillance devices in the conduct of investigation of this case:

(1) Secret Service

(2) United States Treasury Department

(3) Department of Justice

(4) Any other agency of the Executive Branch of the Government.

The Assistant United States Attorney, Nathaniel R. Jones, filed with his response an affidavit, based on hearsay, to the effect that "inquiry was made of the United States Secret Service to determine whether defendants were the subject of any electronic surveillance or wiretapping during the course of the government's investigation * * *." The affidavit goes on to state that Secret Service agents who directed the investigation were the subject of inquiries.

Defendants-appellants assert now that this Honorable Court has been misled by the United States Attorney. There is evidence *aliunde* that devices were employed by Government agents involved in the instant case.[1]

The Assistant United States Attorney who submitted the affidavit pointedly dealt only with the two Secret Service agents in residence in the Government offices at Cleveland, Ohio.[2]

It is a matter of common knowledge on the streets of Youngstown that from about July, 1961, through December, 1965, (and even to date of this writing) federal agents from Washington, D. C., headed by an attorney in the Justice Department, John Lynch, Esquire, a Government agent named "Cotner" [3] and a long list of agents from various departments, including the Federal Bureau of Investigation, Secret Service and Internal Revenue Service, operated in the Youngstown area under the heading "Organized Crime Section." One agent (known to us as James Orr) testified of his participation in this case. He was a member of the Organized Crime Section team.[4]

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[1] Police files; Youngstown Police Department, Youngstown, Ohio; Mahoning County, Ohio Sheriff Departmental Records. Dated April 13-14, 1962.

[2] The Assistant United States Attorney is a resident of Youngstown, Ohio, and is either officially or unofficially aware of the general circumstances involving Government agent activity in that area from 1961 through 1965.

[3] A graduate of the special school in Washington D. C. that specialized in instruction on electronic surveillance and phone bugging.

[4] His identification at trial as such is without question. Tr. 223:

> Q. State your name?
> A. James Orr.
> Q. What is your occupation?
> A. Special Agent, Intelligence Division for United States Treasury Department.

(Continued on following page)

The team was reportedly in the area to "clean up the bombing mess." Strollo, one of the defendants-appellants herein, was under surveillance by one John Relic, et al., Internal Revenue Service, a member of the team. Such pursuit was for the purpose of obtaining a statement by Strollo incriminating the so-called Carabbia brothers. (Cf. *Carabbia v. United States*, Sixth Circuit Court of Appeals, No. 17,011.) Serman, appellant, was Strollo's lawyer at this time. The agents, Relic and others, were attempting to persuade (sic) Serman so he would recommend to Strollo that he incriminate the Carabbias in the so-called rackets industry. Serman refused, and Strollo took the Fifth Amendment before the Federal Grand Jury in Cleveland, Ohio, during June, 1963, (just prior to the trial date of this case, July 8, 1963) even though Mr. Tanzer of the Justice Department offered immunity (he would not put it in writing.) Mr. Lynch questioned Strollo before the Grand Jury and wanted Strollo to at least admit that "Serman is your lawyer."

It should further be noted that John Paladinick[5] (the key witness here) was not taken to Secret Service offices at 9 Front Street, Youngstown, Ohio, on the night of his capture, February 8-9, 1963. He was taken to the temporary headquarters of the Organized Crime Section on Mahoning Avenue, outside the city.[6]

(Continued from preceding page)

Q. Where are you assigned?

A. Youngstown, Ohio.

Q. Where were you assigned during the month of January, 1963?

A. I was assigned to the Organized Crime Division in Youngstown, Ohio.

[5] Also referred to as "Jay Denick" in the record.

[6] Tr. 88: Testimony of John Paladinick:

The Court: * * * "You went to the post office building in Youngstown, and there in the presence of certain officers

Significantly, as far back as April 13, 1962, at 3:45 A.M., the FBI agents were seized on the roof of the one-story office building of Attorney Vincent Serman, appellant herein, and they were observed using a "crow bar" to break into the building (26 West Boardman Street, Youngstown, Ohio) by Sergeant E. Farris, Mahoning County Sheriff's Department.[7] The Youngstown Police Department was called and agent in charge "Peterson" and an agent accomplice "Balog" were seized by Patrolman Thomas Howe, Youngstown Police, at gun point. They identified themselves as FBI agents and were immediately released with the caution to "warn the other agents on the roof, because the building is surrounded."

At or near 9:30 A.M. the same morning, a "lease wire" was found extended across the roof of the building. That wire connected an "off premise extension" to 9 Front Street (FBI Headquarters) from Riverside 7-7100, Serman's telephone.

The many law officers involved will not testify unless by compulsory process. We footnote here a partial list of the names of persons either directly or indirectly aware of the extent of electronic and bugging surveillance in

---

(Continued from preceding page)

you made a statement. * * * You told them of your activities in connection with this counterfeit money, is that right?"

Tr. 89:

A. No, sir, I didn't say that. I didn't make a statement at the post office as to my counterfeit activities. It wasn't at the post office I made that statement.

The Court: * * * "Where did that take place?"

A. *It took place at an office on Mahoning Avenue.*

[7] The Sheriff's Department is across the street and elevated high enough to see onto the roof of Serman's office.

the Youngstown area [8] including Serman's premises and Strollo's premises [9] then known as "The New Duck Inn" 537 Poland Center Road, Poland, Ohio.

The procedures here violate constitutional safeguards between attorney and client. (cf. *Black v. United States,* 385 U. S. 26 (1966), 17 L. ed. 2d 26; *O'Brien v. United States,* ____ U. S. ____, (1967), 18 L. ed 2d 94, 87 S. Ct. ____).

This is the same crew of organized crime "specialists" in the cases of *Carabbia v. United States,* No. 17,011, and *DeNiro v. United States,* Nos. 17,053, 17,054 and 17,055, United States Court of Appeals, Sixth Circuit.

Other cases are presently pending in the Sixth Circuit based on action by the Director of the Federal Bureau of Investigation authorizing the employment of various "bugging devices." *DeNiro v. United States, supra.*

Because of the unlimited and unlimitable invasion of the fundamental rights protected by the Fourth, Fifth and

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[8] Justice Department: Fred Vinson, Esquire, John Lynch, Esquire, Tanzer, Esquire, Myron Ghettings, Esquire.

Agents: John Relic, Cotner, James Orr, "Stan" Peterson, Conway, DiGarmo, Balog.

Sheriff's Office: Sheriff R. Davis, Sergeant E. Farriskin, (in charge of two squad cars sent to scene.)

City Police: (See Youngstown Police Department records for April 13, 1962, 3:45 A.M.) Leschnock, Howe, Ritter, Popovich, *Jerome Bernat*: Note this is the same agent-detective accused at bar of suppressing evidence. On February 26, 1964, he was called before Council in the City of Youngstown (then engaged in legislative hearings on the wiretapping and phone bugging issue) and he refused to cooperate in any manner. Minutes of that meeting are available.

[9] The Federal Bureau of Investigation monitored one particular telephone conversation between appellant Serman (attorney) and appellant Strollo (client) on or about February 1, 1963, at or near 7 P.M. to 9 P.M. Concerning the counterfeit passing activities of John Paladinick and Robert Armstrong, tape recordings of such conversation are available if the Federal Bureau of Investigation is required to produce them.

Sixth Amendments, wiretapping and other forms of electronic eavesdropping ought to be further prohibited.

It is urgently hoped that our courts will not permit constitutional differentiation on such vital matters as set forth in the case at bar, both as to points I and II, as well as point III.

We respectfully point out that:

> "it may not be amiss to remind that the question(s) is not whether guilt may be spelt out of the record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the Federal Courts." *Bollenbach v. United States,* 326 U. S. 607.

The credibility of the United States Government is at stake. It suffers greatly these days. The most recently appointed Attorney General, Mr. Ramsey Clark, has declared to the news media (Associated Press March 20, 1967) that a ban on eavesdropping would *not* aid criminals. On the contrary, said Mr. Clark, the ban would aid law enforcement. "Public safety will not be found in wiretapping."

We urge this Honorable Court to join the Supreme Court of the United States in closing the door to constitutional differentiation by prosecution agents, law enforcement agents and others who would circumvent the law in the name of alleged "crime busting." The credibility of the Government suffers, unfortunately, not the individuals who at those times represented the Government.

The news media is full of comment on the subject. Our democratic system commences to teeter on a slide toward totalitarianism. Soon the Executive, Legislative

and Judicial Branches will find (hopefully not too late) that the "tail commences to wag the dog!"

Respectfully submitted,

VINCENT SERMAN, *pro se*
DAN W. DUFFY
JOHN J. KANE, JR.
JOHN A. WIETHE
Attorney for Defendants-Appellants, Vincent Serman and Lenine Strollo.

Certificate of Service.

It is hereby certified that service of this motion has been made on opposing counsel by mailing a copy thereof on this 9th day of May, 1967, in an envelope, with postage prepaid, properly addressed to him as follows:

United States Attorney Merle McCurdy
Nathaniel R. Jones, Assistant
400 Federal Building
Cleveland, Ohio 44114

JOHN A. WIETHE
Attorney for Defendants-Appellants.

RESPONSE TO MOTION OF DEFENDANTS TO DETERMINE EXISTENCE OF ELECTRONIC SURVEILLANCE.

(Filed in United States Court of Appeals for the Sixth Circuit April 3, 1967.)

Now comes the United States of America by Merle M. McCurdy, United States Attorney, and Nathaniel R. Jones, Assistant United States Attorney for the Northern District of Ohio, and says that defendants served the Gov-

ernment with a copy of a motion and memorandum on March 29, 1967, said motion seeking an order upon the United States of America to examine its files and reveal to this Court the existence of any electronic surveillance that took place in connection with its investigation of defendants.

The motion does not set forth any factual basis for said request. Nothing is recited to indicate the reason why defendants believe that the Secret Service utilized electronic equipment in its investigation of their counterfeiting activities.

It is worth noting that said motion was apparently filed after notice was received by all parties that oral arguments were set on the defendants' appeal from an order by District Judge Girard Kalbfleisch denying them a new trial, said arguments having been scheduled for Monday, April 3, 1967.

However, in order to expedite a determination of all issues now raised by defendants, the United States is attaching an affidavit (*Exhibit A*) of Nathaniel R. Jones, Assistant United States Attorney, that denies the use of electronic surveillance in any phase of the investigation into the defendants' counterfeiting activities.

MERLE M. MCCURDY,
United States Attorney,
By NATHANIEL R. JONES,
Asst. U. S. Attorney.

Receipt of copy of Response to Motion of Defendants to Determine Existence of Electronic Surveillance is hereby acknowledged this 31st day of March, 1967.

Attorney for Defendant-Appellants.

EXHIBIT A.

Affidavit of Nathaniel R. Jones.

STATE OF OHIO,
CUYAHOGA COUNTY, SS

1) I am an Assistant United States Attorney for the Northern District of Ohio and am assigned to the cases of United States v. Vincent Serman and United States v. Lenine Strollo.

2) Inquiry was made of the United States Secret Service to determine whether the defendants were the subject of any electronic surveillance or wiretapping during the course of the government's investigation into their activities with a counterfeiting ring in the Youngstown, Ohio area.

3) The defendants herein were not the subjects of any electronic surveillance or wiretapping in connection with any phase of the investigation conducted by the government.

4) I base this statement upon inquiries made of agents of the Secret Service who directed the investigation for the government.

NATHANIEL R. JONES.

(Jurat omitted.)

MOTION AND MEMORANDUM IN OPPOSITION TO "JOINT REMONSTRANCE" OF APPELLANTS, AND AFFIDAVITS.

(Filed in United States Court of Appeals for the Sixth Circuit May 18, 1967.)

Now comes Nathaniel R. Jones, Assistant United States Attorney for the Northern District of Ohio, and moves the Court for an order dismissing the pleading of appellants described as a "joint remonstrance," for the reason that the motion is unmeritorious, redundant, filed solely for purposes of delaying the carrying out of sentences imposed by the District Court, dilatory and not filed in good faith.

NATHANIEL R. JONES,
Asst. U. S. Attorney.

MEMORANDUM.

It is important to sketchily review the procedural history of this case. Appellants were arrested on February 12, 1963, indicted on February 15, 1963 and proceeded to trial July 8, 1963. A verdict of guilty was returned by the jury against the defendants on July 23, 1963. Serman was sentenced to 13 years and Strollo to 9 years by District Judge Girard E. Kalbfleisch on July 31, 1963. Since that time appellants have taken their appeals. In each instance the convictions have been upheld. Then appellants tried a new approach, i.e. seeking new trials on the basis of purported new evidence. This was denied by the District Court and the denial upheld by this Court. A petition for rehearing has been filed and is now pending before this Court. It is worth noting that on the eve of oral arguments before this Court on the issue of a new trial, appellants injected the question of electronic surveillance into the proceedings. The United States immediately responded

so that the Court could consider all issues at the same time, which it did.

In the petition for rehearing, appellants refer to the electronic issue. However, through other counsel, appellants filed their joint remonstrance detailing alleged acts of wiretapping and attempted wiretapping by the F. B. I. This was done, appellants charge, in connection with an organized crime investigation in Youngstown.

In order that there will be no doubt about it, the United States of America is filing with this Court affidavits from Wilbert K. Deckard, Special Agent in Charge, Cleveland Office, United States Secret Service (Exhibit A) and Mitchell Dobeck, Special Agent, Secret Service (Exhibit B) in which affidavits they deny that any electronic surveillance was utilized in the counterfeiting investigation of Serman and Strollo. They, by way of affidavits, also deny that the Secret Service received any information or evidence from the F. B. I. or any other agency of government with reference to this case or these defendants.

Due to the limited time since the filing of the "joint remonstrance" there has been no opportunity to check into the various allegations against the F. B. I. contained in the motion. The allegations contained in the "joint remonstrance," however, have absolutely nothing to do with the offenses of which Serman and Strollo were convicted and they played no part, even if true, in the trial and convictions. It is clear that the F. B. I. was not involved in the Secret Service investigation of Serman and Strollo.

It would appear that society is entitled to have the sentences duly imposed against Serman and Strollo put into effect. They were convicted in July, 1963. Due process of law has been accorded them. Should the Court harbor any doubt about the issues appellants now seek to raise, they can be explored and examined into while the

sentences are being carried out. As was stated so well in *United States v. Johnson*, 327 U. S. 106, "* * * prompt enforcement of sentences in the event of convictions are objectives of the criminal law." There has been a conviction here. The conviction in each instance was affirmed. Certiorari was denied. A new trial motion was denied. Its denial was affirmed. There is no reason why the matter of execution of sentence should be delayed any longer.

Respectfully submitted,

NATHANIEL R. JONES,
Asst. U. S. Attorney.

Certificate of Service.

Copy of the within Motion mailed this ____ day of May, 1967, to Vincent Serman, c/o Dan W. Duffy, National City East 6th Building, Cleveland, Ohio 44114, and to Dan W. Duffy, National City East 6th Building, Cleveland, Ohio 44114, John J. Kane, Jr., Superior Building, Cleveland, Ohio 44114, and John A. Wiethe, 15 West Sixth Street, Cincinnati, Ohio 45202, attorneys for defendant-appellants.

NATHANIEL R. JONES,
Asst. U. S. Attorney.

AFFIDAVIT OF W. K. DECKARD.

STATE OF OHIO,
CUYAHOGA COUNTY, SS

I am W. K. Deckard, Special Agent in Charge, Cleveland Office of the United States Secret Service, and have been since February 4, 1963. In this capacity I directed the investigation conducted by the United States Secret Service into the counterfeiting activities of Vincent Serman, Lenine Strollo and others. This investigation culminated in the arrest of said persons on February 12, 1963 for the violation of federal laws against counterfeiting.

No electronic surveillance or wiretapping took place as a part of this investigation. Mr. Serman and Mr. Strollo were not the subject of any such electronic surveillance or wiretapping during the cousse of this investigation by the Secret Service.

Furthermore, the investigation of Mr. Serman and Mr. Strollo for counterfeiting violations was at all time in the hands of and under the exclusive control of the Secret Service. Absolutely no information was received by the Secret Service from the Federal Bureau of Investigation or any other agency of the Executive Branch of the Government pertaining to this case.

On May 10, 1967, I advised the Assistant Director of the United States Secret Service, in writing (a copy of which is hereby attached and incorporated into and made part of this affidavit), that no information or evidence against Serman and Strollo was obtained through the use of electronic devices.

In connection with the utilization of Special Agent James Orr of the Treasury Department, he was loaned to the Secret Service to assist in the personal surveillance of the subjects of the investigation and worked under the direction of the Secret Service.

With reference to the place where John Paladinich was interviewed, the Secret Service used facilities rented by the Treasury Department on Mahoning Avenue. This was done for reason of convenience and the availability of typewriters and interview rooms in view of the fact that Secret Service does not have an office in Youngstown. The interview was conducted exclusively by the Secret Service.

W. K. DECKARD.

(Jurat omitted.)

U. S. Secret Service
J-2-3-CO-2163-1

May 10, 1967

Thomas J. Kelley, Assistant Director
Investigations

SAIC Deckard—Cleveland
Vincent P. Serman and Lenine Strollo—Defendants
Counterfeit Notes

On May 10, 1967, Special Agent Robert R. Snow, Counterfeit Section, Headquarters, by telephone requested certification to the effect that there was no invasion of privacy of Vincent P. Serman or Lenine Strollo by the use of electronic devices during the investigation which led to the arrest of these two defendants.

This is to advise you that the Cleveland Office of the U. S. Secret Service did not obtain any information or evidence against Serman, Strollo or any other defendant in this case through the use of electronic devices.

W. K. DECKARD,
Special Agent in Charge.

WKD/jd

AFFIDAVIT OF MITCHELL DOBECK.

STATE OF OHIO,
CUYAHOGA COUNTY, SS

I, Mitchell Dobeck, am a Special Agent with the United States Secret Service, Cleveland Office. I have been a Special Agent for 18 years. I participated in the investigation conducted by the Secret Service into the counterfeiting activities of Vincent Serman and Leninė Strollo in the Youngstown, Ohio area during 1962 and 1963. I am familiar with all phases and aspects of said investigation and can and do say the following:

1) The Secret Service did not utilize any electronic devices or employ wiretapping in any phase of the investigation of Vincent Serman and Lenine Strollo.

2) No information or evidence in this investigation was received from the Federal Bureau of Investigation or any other agency of the Executive Branch of the Government.

MITCHELL DOBECK

(Jurat omitted.)

May 23, 1967

United States Court of Appeals
Sixth Circuit
Cincinnati, Ohio 45202

In re: Serman v. United States—17057
Strollo v. United States—17058

To: Honorable Chief Judge Weik
Senior Judge Cecil
Senior Judge Miller

Appellants are compelled to notify the Honorable Court of the following:

1. Affiant Deckard *was not* involved in the investigation of this case until February 5, 1963. This case was investigated from January 4, 1963, through February 1, 1963. The record will so show.

2. The officers who commenced the investigation were J. Bernat,[1] detective Youngstown Police Department and Donald Komara, detective Youngstown Police Department.

3. The Youngstown detectives were followed by the appearance on Saturday, January 5, 1963, of Agents Herbert Dixon, Kenneth Morrow and Ronald Szego of the Secret Service.

4. Others were involved in the investigation at or near the 25th day of January, 1963. This team *did not* include Deckard.

5. The other affiant, Agent Dobeck, is not telling the truth. There is no record of investigation of any kind concerning counterfeit activities in the "Youngstown Area" during 1962.

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[1] This is the officer charged with suppression of evidence in this case. See brief and appendix, this appeal.

6. Appellants urge that compulsory process for obtaining truthful testimony is the proper way to perfect the issues here.

Respectfully submitted,

VINCENT SERMAN,
pro se

DAN W. DUFFY,
of counsel for
Appellant Serman.

JOHN KANE,
of counsel for
Appellant Strollo.

A copy of the within letter has been mailed on this __ day of May, 1967, to Attorney Nathaniel Jones, Assistant United States Attorney, Federal Building, Cleveland, Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 320

VINCENT SERMAN AND LENINE STROLLO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 32) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1967. A petition for rehearing was denied on June 1, 1967. The petition for a writ of certiorari was filed on July 1, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioners' motions for new trial based on the ground of newly discovered evidence.

274-987—67——1

2. Whether the court of appeals erred in denying petitioners' motions concerning wiretapping and electronic eavesdropping.

STATEMENT

On July 23, 1963, in the United States District Court for the Northern District of Ohio, petitioners were convicted of passing counterfeit notes and conspiring to do so (R. 6a–7a, 12a–15a).[1] On July 31, 1963, petitioner Serman was sentenced to imprisonment for a total period of thirteen years and petitioner Strollo to imprisonment for a total of nine years with five years' probation to follow (R. 7a).[2] The court of appeals affirmed the convictions and this Court denied petitions for writs of certiorari (381 U.S. 912).

On October 15, 1965, four days after this Court's denial of petitions [illegible] rehearing (382 U.S. 873), petitioner Serman file[illegible] ground of newly [illegible] and on October 28, [illegible] lar motion (R. 31[illegible] district court den[illegible] (R. 57a). The cou[illegible] 32).

1. Since the alle[illegible] must be evaluated [illegible] summarize the rev[illegible]

[illegible]ations in the motion for a new trial [illegible]gainst the evidence at the trial, we [illegible]ant trial testimony.

[illegible]printed appendix filed by petitioners in [illegible]Tr." refers to the transcript of the pro[illegible]al, a copy of which is being lodged with

[illegible] Strollo received probation, is not here in

[1] "R." refers to the [illegible] the court of appeals. [illegible] ceedings at the 1963 t[illegible] the Clerk of this Cou[illegible]

[2] Count 5, on whic[illegible] issue (see Pet. p. 2).

John Paladinich testified that in the fall of 1962, petitioner Serman, a childhood friend who had become an attorney, spoke with him on several occasions about passing counterfeit money which Serman expected to obtain (Tr. 2–6). On January 3, 1963, at the home of petitioner Strollo, he, Strollo and Serman counted through several packages of counterfeit $10 Federal Reserve Notes and talked about the method to be used in passing them (Tr. 7–11). Strollo then showed Paladinich a desk containing additional stacks of bills in three different serial numbers (Tr. 11–12). It was agreed that Paladinich would enlist his brother, Joseph, to aid in passing the notes, and that the first $7,500 obtained in genuine currency would be given to Serman to pay off the printer (Tr. 12–13, 98). Serman then handed Paladinich $1,000 in counterfeit

[illegible] given about $80 in genuine currency, together with the items they had purchased (Tr. 22, 160).[1] Thereafter the brothers drove to Warren, Ohio, where each continued to pass counterfeit notes until Joseph was apprehended in a department store (Tr. 23–24, 161–163; see Tr. 273–274).

[1] The items were later found by Secret Service agents in the basement of Strollo's home (Tr. 61–63, 65–69, 71–73, 171–172, 246, 251–257).

Joseph Paladinich testified that the following morning, when petitioner Serman came to the Warren city jail to arrange for his release on bail, Serman told him not to tell the law enforcement officers anything which might jeopardize the others (Tr. 163–164, 199–201). However, when interviewed by Secret Service agents, Joseph voluntarily disclosed what he knew concerning the counterfeiting activities and agreed to keep Agent Dixon informed of future developments (Tr. 161, 211).

John and Joseph Paladinich testified that on January 25, 1963, they arranged a meeting with Serman at a public area in a local store, and inquired about resuming the passing of counterfeit notes (Tr. 37). Serman stated it would be too risky to have Joseph pass again, but indicated that John Paladinich

50, 53–54). At one store Armstrong, who feared he had been discovered, ran from the store, abandoning some of the remaining counterfeit notes in a nearby washroom. When Armstrong and Paladinich returned to Youngstown, Strollo and Serman advised them to say nothing as Treasury agents had been following them (Tr. 55, 59–60, 74; see Tr. 239–240). The notes abandoned by Armstrong were later recovered by federal agents (Tr. 243–244). Various agents testified to surveillances which confirmed the activities of petitioners on the night of January 31 (Tr. 230–236, 291–294, 306–311, 408, 410–411).

2. In their motions for new trials, to which supporting affidavits were appended, petitioners asserted that they had recently learned through Mildred Socie, an acquaintance of petitioner Serman since 1956 (R.

ARGUMENT

1. Petitioners argue that the matters in Mrs. Socie's statement suggest that John Paladinich, rather than petitioners, was the source of the counterfeit currency, and that the matters "go to the heart of the charges on which these petitioners were convicted" (Pet. 12). Even if the allegations are accepted, they most logically suggest only that in addition to discussing the passing of counterfeit notes with petitioner Serman in the fall of 1962, Paladinich found a temporary storage place for what might have been some of the printing paraphernalia, and that he gave to Socie, as well as to his brother, some of the notes obtained from petitioners on the night of January 3, 1963. At most, the allegations are simply impeaching as to Paladinich by suggesting that he was deeply involved in counterfeiting activities. Far from being of a nature that would probably produce an acquittal in case of retrial, these matters quite clearly are peripheral and immaterial to the offenses charged to petitioners. The evidence that petitioners conspired with Paladinich to pass counterfeit notes, supplied in part by the surveillance by the Secret Service agents which included overhearing a portion of Serman's conversation with the Paladinich brothers on January 25, 1967, is entirely unaffected. Under such circumstances, the district court, which had observed the presentation and the development of the evidence at the trial, did not abuse its discretion by denying the motions (See *Mesarosh* v. *United States*, 352 U.S. 1, 9; *United States* v. *Curry*, 358 F. 2d 904 (C.A. 2), certiorari denied, 385 U.S. 873;

Beyda v. *United States*, 324 F. 2d 526 (C.A. 9); *Ferina* v. *United States*, 302 F. 2d 95 (C.A. 8), certiorari denied, *sub nom. Cardarella* v. *United States*, 371 U.S. 819; *United States* v. *Lawrenson*, 298 F. 2d 880 (C.A. 4), certiorari denied, 370 U.S. 913) and it could properly do so upon consideration of the movants' contentions and affidavits alone (see *United States* v. *Johnson*, 327 U.S. 106; *United States* v. *Troche*, 213 F. 2d 401, 403 (C.A. 2); *United States* v. *On Lee*, 201 F. 2d 722 (C.A. 2) certiorari denied, 345 U.S. 936; *United States* v. *Hoffa*, 247 F. Supp. 692, 698 (E.D. Tenn.) affirmed, 376 F. 2d 1020 (C.A. 6), certiorari pending, No. 432, this Term). The related argument concerning Socie's purported confession to a Youngstown police officer—a confession which was not alleged to have been known to the federal authorities—similarly has no bearing on petitioners' convictions.

Pointing out that the Paladinich brothers ultimately received suspended sentences and were placed on probation for their part in the offenses, petitioners asserted in their motions that John and Joseph Paladinich had lied at trial when they denied that they had been promised consideration for their testimony (R. 30a, 33a). At the sentencing proceedings the government attorney called the court's attention to the cooperation of the Paladinich brothers in the case and advised the court that the Secret Service had recommended probation (R. 56a). There is nothing to indicate, however, that the government had offered to make such a recommendation as an inducement for the brothers' testimony at trial. In view of the spe-

cific denials of any such inducement (Tr. 86–88, 204) the district judge, who had observed the brothers in making the denials at trial, was justified in rejecting, without a hearing, this ground for a new trial.

2. In the court below, petitioners filed a motion for an order directing that the Department of the Treasury, the United States Secret Service, and the Department of Justice examine their files and report whether petitioners had been the subjects of official wiretapping or electronic eavesdropping (Pet. App. 33–35). In response to the motion, an affidavit was filed by an Assistant United States Attorney stating that he had inquired of the United States Secret Service and had been informed that no such wiretapping or eavesdropping was employed in the government's investigation of petitioners' counterfeiting activities (Pet. App. 42–44). The motion was denied by the court of appeals (Pet. App. 32). Petitioners then filed a further pleading on the subject (Pet. App. 36–42), alleging that in April 1962 two F.B.I. agents had been found on the roof of the building in which petitioner Serman's office was located, and that later that same day a wire was found which connected Serman's telephone line to F.B.I. headquarters (Pet. App. 39). Seven days later the government filed a memorandum in opposition, noting that, while there had not been time to check petitioners' specific allegations with the F.B.I., the F.B.I. had not been involved in the investigation of the charged offenses (Pet. App. 45–47). Appended were affidavits of the Secret Service Agent in charge of the investigation of petitioners since February 4, 1963, and of a second Secret Service

Agent "familiar with all phases and aspects of said investigation" in 1962 and 1963. They swore that the investigation was under the exclusive control of the Secret Service, that no wiretapping or electronic eavesdropping was employed in any phase of the investigation, and that no information or evidence in the investigation was received from the F.B.I. or any other federal agency (Pet. App. 45–50). The court of appeals, noting that it had considered all of the documents filed, denied rehearing (Pet. App. 33).

Since the government affidavits demonstrated that there had been no electronic surveillance of petitioners in the investigation of the offenses for which petitioners were convicted, the court's disposition of the matter was entirely proper. Moreover, pursuant to the policy set forth in our Supplemental Memorandum in *Schipani* v. *United States*, No. 504, October Term, 1966, 385 U.S. 372, we have conducted an additional review to determine whether any electronic eavesdropping or wiretapping affected petitioners' convictions. We have found no indication that petitioner Serman's telephone had been tapped by the F.B.I. We have further found that there is nothing in the case warranting notification to this Court or warranting any other proceedings in this regard.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

SEPTEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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In the Supreme Court of the United States

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vs.

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BRIEF IN REPLY TO UNITED STATES' OPPOSITION.

VINCENT SERMAN,
LENINE STROLLO,
Petitioners pro se.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN REPLY TO UNITED STATES' OPPOSITION.

1. The Government seeks to oppose the petition on the ground that the evidence at the trial was such that acquittal is not possible because the trial testimony is of such magnitude that the newly discovered evidence [illegible] [illegible] [illegible]

2. The testimony of witness Pacak (T.R. 697, lines 16-25; T.R. 700, lines 1-5, 13-25; T.R. 701, lines 1-10, 15-18).
3. The testimony of witness Armstrong (the admitted accomplice of John and Joseph Paladinich) (T.R. 725, 726, 727, 728, 729, 735, 739, 740, 741, 742, 743).

The newly discovered evidence directly attacks and refutes Paladinich's story and proves him to be the producer and caretaker of the counterfeit bills and paraphernalia, along with the accomplice, not known at the time of trial, one Raymond Socie; the latter being the person that Agent-Detective Bernat[2] took a statement from and suppressed same.

The Government does not in any way attack the requisites for newly discovered evidence under Rule 33;[3] the Government attacks only on the last of the criteria set forth as the basis for a new trial under the Rule, viz., can the newly discovered evidence produce an acquittal if a new trial were ordered? Petitioners submit that they have met all such requisites and further show that suppression of evidence played a vital role in the Government's case. Petitioners submit that they are not dealing with mere error of law occurring in the course of pre-investigation and trial which can be disregarded as harmless. It may not be amiss to remind that the question is not whether

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[2] See page 7, Government's brief. The Government would have the Court believe that Bernat was some obscure city policeman; the fact is that he was directly connected with the investigation of this case from the very beginning (T.R. 287, 288); the testimony by John Paladinich (20a) and Mrs. Socie (34a-44a) show in part how Bernat was deeply involved in the original investigation of this matter.

[3] It should be recalled that when the motions for new trial were filed in the District Court, the Government never denied or opposed the facts asserted in the motions, supporting affidavits or supporting sworn statements.

guilt may be spelled out of the record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in Federal courts. (*Cf. Wrightson v. United States*, 222 F. 2nd, at page 561; *Bollenbach v. United States*, 326 U.S. 607).[4]

The testimony of Agent Shaw is beyond belief when the record is examined. To believe that Serman, a practicing lawyer, would make such statements in a public place (if he were criminally involved) is indicative of either misunderstanding or effort to bolster manufactured evidence —even so, why, if the Government's position is correct, that is, if they rely on the truthfulness of witness Paladinich's testimony,[5] would Serman be making such statements on January 25, 1963, as stated by Agent Shaw?[6]

Furthermore, if the Government's position, as stated in its brief at page 6, "Paladinich found a temporary storage place for what might have been some of the printing paraphernalia, and that he gave to Socie, as well as to his brother, some of the notes obtained from petitioners on the night of January 3, 1963," is correct, would the comments charged to Serman be necessary if all such were true? Therefore, far from being "peripheral and immaterial" the newly discovered evidence and the suppressed evidence is vital, and would, without question, cause a

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[4] The cases deal with misdirection of a jury by the trial judge after submission of the case; this was the subject of prior appellate action in the instant case; it is here argued that the language in the *Wrightson* case is most appropriate for the position taken by the Government at this time.

[5] That Paladinich saw counterfeit bills in petitioner Strollo's basement on January 3, 1963.

[6] Agent Shaw's testimony melts away, upon a study of the record (T.R. 216), Shaw saying he overheard petitioner Serman say *on a telephone* "We can handle all you want," as against the testimony of Government witness, Joseph Paladinich, who testified Agent Shaw did not enter the restaurant until *after* the said telephone call was made. (T.R. 166, lines 24, 25; T.R. 167, lines 1-25.)

verdict of not guilty to be returned if the jury were to hear the true facts. (*Mesarosh v. United States*, 352 U.S. 1; 1 L. ed. 2d 1 (1956).)[7]

Mesarosh v. United States, 352 U.S. 1; 1 L. ed. 2d 1, headnote 6:

> "On admission by the government, following a conviction of several defendants in a prosecution for crime in a federal court, that certain of the government testimony was tainted, the district judge is not the proper agency to determine that there was sufficient evidence at the trial, apart from the tainted portion thereof, to sustain a conviction of any of the defendants, since only the jury can determine what it would do on a different body of evidence; in this situation, if the case should be remanded to the District Court and that court should rule that the verdict against some of the defendants could stand, the United States Supreme Court, on a subsequent appeal, would be obliged to reverse and direct that a new trial be granted."

Hence, in response, what could be more relevant than the matter asserted and supported by affidavits, sworn statements and transcripts of official Federal Court proceedings?

The Government, on page 7 of its brief in opposition in this Court, states, "There is nothing to indicate, however, that the government had offered to make such a recommendation as an inducement for the brothers' (John and Joseph Paladinich) testimony at trial." (T.R. 88.) When asked if he had talked to Treasury agents on whether or not his brother, Joseph Paladinich, could get probation, the witness answered, "I don't recall doing so."

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[7] The proper agency to determine whether it was sufficient evidence at the trial to sustain a conviction of either of petitioners can only be determined by a jury; the jury can no longer act in the instant case, as was the situation in the *Mesarosh* case.

Factually, he reiterated that statement twice! Hence, far from being a positive denial of an intimation of probation for the witness' services, the Government must rest on its witnesses' statements, "I don't recall." The Government must rely on the transcript of the record of the proceedings before District Judge Ben C. Green on February 21, 1963 (see Appendix 50a), as to Joseph Paladinich's arraignment and plea of guilty and (Appendix 51a) as to John Paladinich's arraignment and plea of guilty showing preferential treatment over other defendants arraigned at the same proceedings; further, the transcript of sentencing proceedings (Appendix 55a) before District Judge Ben C. Green on September 20, 1963, approximately two months after the trial date, clearly shows the ultimate in preferential treatment for services rendered by granting probation for both men under the circumstances. (The District Judge was acceding to the wishes of the Secret Service and the District Attorney. That record so shows.)

It should be noted at this point that the trial judge (District Judge Girard Kalbfleisch) would not have before him the transcript of the two proceedings, viz., February 21, 1963 and September 20, 1963, when he summarily overruled the motions for new trial. The petitioners had requested an oral hearing on the motions for new trial for the purpose of presenting testimony and evidence such as the transcripts of the pleas and sentencing hearings of the Government witnesses.

This Honorable Court held in *Gordon v. United States*, 344 U. S. 414, 97 L. ed. 447 (1952), headnote 9:

> "It is error for the trial judge at a federal criminal trial to exclude, as immaterial, a transcript of separate criminal proceedings against a government witness, an alleged participant in the crime, from which it appears that the judge, in accepting the witness' plea of guilty, admonished him to 'tell the probation

authorities the whole story even though it might involve others,' where the government relied principally upon the witness to implicate the defendants, and the witness, at the time of the trial and nine months after pleading guilty, was still unsentenced."

2. With reference to wiretapping or electronic eavesdropping of petitioner Serman's office, completely denied in the brief for the United States, leaves the petitioners nonplussed for the reason that Government agents were found on the roof of the building in which petitioner's office was located. However, we must assume under the policy set forth in the supplemental memorandum in *Schipani v. United States*, No. 504, October Term, 1966, 385 U.S. 372, that no agents of the Government were found on the roof of that building and that the local authorities must be in error in determining that the persons found on the roof of that building with wire and wire tools were Government agents, or must we more properly say under *Schipani* that wiretapping and electronic surveillance, even though involving trespass or breaking and entering by Government agents, is to be commended in all situations where the victim cannot show that the Government did not gain a proven particular advantage of a proven particular set of facts with reference to a particular offense on a particular day.

CONCLUSION.

The writ of certiorari should issue from this Court to the United States Court of Appeals, Sixth Circuit, on the petition for a writ of certiorari filed by petitioners in this case. The reasonings contained in the brief for the United States in opposition to these petitioners, seem inadequate and show no justification for the summary overruling of the motions for new trial by the District Court.

Respectfully submitted,

VINCENT SERMAN,
LENINE STROLLO,
Petitioners Pro Se.

Attorneys:

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In the Supreme Court of the United States

No. 370

VINCENT SERMAN and LENINE STROLLO,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

VINCENT SERMAN,
LENINE STROLLO,
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Appendix (Attached):

Order of the United States Court of Appeals for the Sixth Circuit ---- 1a

Motion to Show Cause in the United States District Court for the Northern District of Ohio, Eastern Division ---- 1a

Order to Show Cause ---- 3a

Memorandum Opposing Motion to Revoke Bail 3a

Transcript of Proceedings at Oral Hearing on Motion to Show Cause Before Hon. Girard E. Kalbfleisch, Judge of Said Court, on Friday, July 14, 1965, at 9:30 O'Clock A.M. ---- 7a

Response to Memorandum of Defendants Re: Bail Revocation ---- 10a

Letter, July 27, 1967, John F. Davis, Clerk, to Hon. Thurgood Marshall ---- 17a

Letter, August 7, 1967, John J. Kane, Jr., and Dan W. Duffy to Hon. G. E. Kalbfleisch -- 18a

Memorandum and Order Re: Motion to Show Cause Why Bail Should Not Be Revoked ---- 21a

TABLE OF AUTHORITIES.

Cases.

Carter v. Texas, 177 U. S. 442 5

Remmer v. United States, 347 U. S. 227 (1954) 5

Surowitz v. United States, 383 U. S. 363 (1966) 5

Federal Rules of Criminal Procedure.

Rule 33 (Title 18, United States Code, Rule 33) 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 320.

VINCENT SERMAN and LENINE STROLLO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners, Vincent Serman and Lenine Strollo, respectfully pray that, pursuant to paragraph 2 of Rule 58 of the Rules of the Supreme Court of the United States (effective October 2, 1967), that a rehearing be allowed by this Honorable Court of the order entered in this case on October 9, 1967, denying the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioners respectfully show by this petition that circumstances of substantial, unusual and controlling nature, intervened between the time the petition for a writ of certiorari was filed in this Court (July 1, 1967) and the date the Government filed the brief in opposition (September 1, 1967).[1] The new matter is absolute proof that the

[1] Supreme Court Rule 24 (in effect at the time) prevented raising the matter by way of reply. This was new matter not raised by the Government in its brief although the Government had requested and was granted further time to include such matter.

District Court never employed the discretion required by Rule 33, Federal Rules of Criminal Procedure (Title 18, United States Code, Rule 33) [2] The Appeals Court below based its order on a finding that the district judge "did not abuse his discretion" [3] in denying the motion for new trial on newly discovered evidence. The state of mind of the district judge, at the time the original motion for new trial based on newly discovered and suppressed evidence was not known—the Court had simply overruled the motion on the theory that *he did not have jurisdiction.* (See appendix page 8a herein.) Hence, the appeal to the Court below was based on the *mistaken belief* by petitioners *and* the government, that the district judge had given the motion and supporting affidavits and sworn statement careful consideration.

POINT I.

The Court of Appeals below did not have before it the correct position taken by the district court in passing on the motion for new trial on the grounds of newly discovered evidence. It is obvious, upon perusal of the transcript of the proceedings had before the district judge,[4] that he (the district judge) overruled the motion based on the erroneous conclusion that he did not have jurisdiction to entertain the motion under the rule (Rule 33, F. R. Cr. P.). The government had argued in the Court below that the district judge did not abuse his discretion—in fact, they argued further that the district court did not

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[2] The Rule is set out at page 5, petition for certiorari.

[3] See page 32, petition for certiorari.

[4] This transcript was taken at a hearing to show cause why bail should not be revoked (appendix pp. 7a-9a, herein) after the Court of Appeals had overruled such a motion (appendix p. 3a).

even have the necessary documents before the court![5] Therefore, the Court of Appeals was misled by the government's contention that the district court employed an allowable discretion.[6] Thus, it is clear that the district judge never employed an allowable discretion *at that time.* The district judge thought *he did not have jurisdiction.* (Transcript of proceedings on motion to show cause, pp. 7a-9a appendix, herein.)

POINT II.

The district judge *did have jurisdiction to entertain* the motion under Rule 33, Federal Rules of Criminal Procedure, Title 18, United States Code; in fact, the Court *had jurisdiction to grant the motion.* This Honorable Court had denied petitions for rehearing on October 11, 1965 (382 U. S. 873) and petitioner Serman filed the motion for a new trial on the ground of newly discovered evidence (R. 29a-31a) on October 15, 1965; petitioner Strollo filed on October 28, 1965. On December 10, 1965, the district court denied the motions without a hearing and without a scintilla of government opposition to the motion and supporting affidavits.

The Rule clearly stated:

> "* * * if an appeal is pending the court *may grant* the motion only on *remand* of the case."

---

[5] This is untenable, given the position taken by the district judge (pp. 7a-9a, appendix, transcript of proceedings before the district judge) and that taken by the Solicitor General in the brief in opposition before this Court, pages 6-8 of that brief.

[6] Namely, the discretion to overrule the motion for new trial upon consideration of the motion and supporting affidavits and sworn statement of defendants (petitioners), such having been submitted without government opposition at the district court level. (See petitioners' petition in this Court.)

The district judge is of the opinion that this part of the rule prevents him from even entertaining the motion except upon remand:

> The Court (District):
>
> "Now, the rule is clear and unequivocal, that when a case is on appeal, this Court has no jurisdiction over the case. And unless the Court of Appeals, *where your appeal is pending,* remands the case for this court to *hear your motion for a* new trial—that you are now taking to the Supreme Court—I have no jurisdiction at all in it." (Transcript p. 23; appendix page 8a.)

The district judge then went on to discuss his impression of the rule and then went on to ask:

> The Court (District):
>
> "Now how do you get around that. Have you read Rule 33? Neither one of you cited it to me.
>
> "Now, the only reason I am calling it to your attention is that when you people filed this, I naturally felt that it deserved my *fullest study and consideration.* But I ran immediately head-on into the provision of Rule 33: there was no remand; there wasn't anything for me to do but to overrule the motion." (Transcript p. 24; appendix pp. 8a-9a.)

Counsel then pointed out to the Court that *appeal was not pending* (transcript pp. 24, 25; appendix pp. 8a-9a). The district judge then "took the motion under advisement."

Clearly the district court erred. The government took the position that even if the allegations in the motion for new trial were accepted (page 6, government's brief in opposition) they are at most "peripheral and immaterial;" (this taken in the light of the fact that the government never contradicted or assailed the truth of the matters asserted in the motion and supporting affidavits), the government then contends that the "district judge * * * was

justified in rejecting, without a hearing, this ground for new trial." (page 8, government's brief in opposition.) It clearly appears now that the district judge rejected the motion and supporting affidavits without that "deserved * * * fullest study and consideration." Hence, petitioners were not only denied a hearing on the very grave charges involved at the district court level, but also without the slightest serious consideration by the district judge who was of opinion that he did not have jurisdiction to even entertain the motion.[7] Petitioners not only were denied their day in court on the serious matters asserted in the motion and supporting affidavits, but were denied even the slightest consideration of the matters. Surely the vice in this instant matter is as grave as that presented to this Court in *Carter v. Texas*, 177 U. S. 442.[8]

POINT III.

The United States Court of Appeals, Sixth Circuit erred when it ordered the judgment of the district court affirmed on the ground that:

> "The district judge did not abuse his discretion in denying the motion for a new trial on newly discovered evidence."[9]

If the true facts were presented to that court, it would require a reversal, since that court would find that the district judge did not employ discretion when passing on the motions and supporting documents.

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[7] A review of petitioner's petition for writ of certiorari will illustrate the application of the settled principles on the matter of jurisdiction. Cf. *Surowitz v. United States*, 383 U. S. 363 (1966); *Remmer v. United States*, 347 U. S. 227, 229 (1954); see pages 12, 13, petitioner's petition for writ of certiorari.

[8] This case is discussed at pages 13-14, petition for writ of certiorari.

[9] See "order of the United States Court of Appeals for the Sixth Circuit" page 32, petition for writ of certiorari.

CONCLUSION.

The government endeavors to minimize the importance of the inquiry from the very beginning of the proceedings now the subject of this appeal. At the district court level, the government was mute. At the appeals level the government took this position:

> 1st. that the appeal ought to be dismissed because the motions were not filed within two years of final judgment.
>
> 2nd. that the supporting documents were not filed properly.
>
> 3rd. that the appeal was pending too long.

At the Supreme Court level the government takes the position that even if accepted, these matters complained of quite clearly are "peripheral and immaterial;" (page 6, government's opposition brief) that "since the allegations in the motion for a new trial must be evaluated against the evidence at the trial * * *" (page 2) and "under such circumstances, the district court, which had observed the presentation and development of the evidence at the trial, did not abuse its discretion by denying the motions." (See pages 2 and 6, government's brief.)

Petitioners conclude that the district court in this particular case acted arbitrarily. (There are other examples of the district court's arbitrary disposition of matters of record in this case.) On October 6, 1967, the district judge reversed the position he took on July 14, 1967, and held that the matters of record on July 14, 1967, were "rhetorical" and "academic" and that he did not decide the matter on jurisdictional considerations! At the same time, the district judge found that the appeal to this court was not a "frivolous" appeal and that bail should be continued! Thus it would appear that the justice department and the district court are one. The matters com-

plained of are "peripheral and immaterial" and "academic."

For the substantial reasons set forth and in the interests of justice and the proper administration of justice in Federal Courts, petitioners respectfully pray that a rehearing be granted in this case.

Respectfully submitted,

VINCENT SERMAN,
LENINE STROLLO,
Petitioners pro se.

Counsel for petitioners:
DAN W. DUFFY,
1030 National City E. 6th Bldg.,
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607 Terrace Hilton Plaza,
Cincinnati, Ohio,
JOHN J. KANE, JR.,
1405 Superior Bldg.,
Cleveland, Ohio 44114.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58, Rules of the Supreme Court of the United States, effective October 2, 1967.

DAN W. DUFFY,
Attorney.

APPENDIX.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered July 5, 1967.)

On consideration of the motion of Plaintiff-Appellee to revoke bail and the memorandum of Defendants-Appellants in opposition to the motion, it appears that bail in this case was allowed by the District Court. The motion to revoke bail should, therefore, in the first instance be directed to that Court. The motion will, therefore, be denied without prejudice to renewal in the District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

MOTION TO SHOW CAUSE IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Now comes the United States of America, by and through Merle M. McCurdy, United States Attorney, and Nathaniel R. Jones, Assistant United States Attorney for the Northern District of Ohio, and pursuant to the provisions of Rule 46(a)(2) of the Federal Rules of Criminal Procedure, respectfully moves this Court for an Order directing defendant-appellants, Vincent Serman and Lenine Strollo, to show cause why bail previously set by this Court in this matter should not be revoked.

MERLE M. MCCURDY,
United States Attorney,

BY NATHANIEL R. JONES,
Asst. U. S. Attorney.

MEMORANDUM.

It has been almost four years since the conviction of Lenine Strollo and Vincent Serman in the United States District Court, which was in July, 1963. Defendant-appellants have unsuccessfully taken appeals from this Court to the Court of Appeals and to the United States Supreme Court, which denied writs of certiorari.

Defendants-appellants' motions for new trials on grounds of newly-discovered evidence were denied by the District Court and the denials affirmed by the United States Court of Appeals for the 6th Circuit.

In response to a motion filed by the United States of America in the 6th Circuit Court of Appeals to revoke bail of Serman and Strollo, the Court denied same without prejudice on July 5, 1967. However, the Court of Appeals said (see Exhibit A):

> "The motion to revoke bail should * * * in the first instance be directed to [District Court]. The motion will, therefore, be denied without prejudice to renewal in the District Court."

The Court has jurisdiction under the provisions of Rule 46(a)(2) of the Federal Rules of Criminal Procedure to revoke the order admitting the defendants to bail at any time, and in view of the length of the appeals that have been taken by the defendants-appellants, the United States of America is of the view that the orderly administration of justice requires that bail be revoked forthwith.

Respectfully submitted,

MERLE M. MCCURDY,
United States Attorney,

NATHANIEL R. JONES,
Asst. U. S. Attorney.

ORDER TO SHOW CAUSE.

(Entered July 7, 1967.)

On the Motion of the United States of America, by and through Merle M. McCurdy, United States Attorney, and Nathaniel R. Jones, Assistant United States Attorney for the Northern District of Ohio,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendant-appellants, Lenine Strollo and Vincent Serman, show cause on Friday, July 14, 1967, at 9:30 A.M. as to why bail previously set by this Court in this matter should not be revoked.

GIRARD E. KALBFLEISCH,
United States District Judge.

MEMORANDUM OPPOSING MOTION TO REVOKE BAIL.

This case is now pending in the United States Supreme Court on a petition for writ of certiorari to the United States Court of Appeals, Sixth Circuit.[1] The petition was filed on July 1, 1967.

On December 10, 1965, this Court overruled motions by the defendants for a new trial without opinion. Defendants appealed that order (United States Court of Appeals for the Sixth Circuit Nos. 17,057; 17,058), and the Court of Appeals affirmed the order of the District Court without opinion. Petition for rehearing was likewise over-

[1] A copy of the petition and separate appendix is annexed hereto and marked Exhibit "A." The certified record of appeal proceedings and appendix were filed with the petition. (October, 1967—No. 320.)

ruled. (See pages 31-33, Exhibit "A".) On June 5, 1967, defendants filed a motion in the United States Court of Appeals "to stay mandate pending appeal to the United States Supreme Court." [2] In that motion defendants and counsel certified that the appeal was to be filed in good faith and for good cause and not for the purpose of delay.[3] The United States Attorney opposed the motion. Defendants filed a memorandum opposing the position taken by the United States Attorney.[4] On June 15, 1967, the Court of Appeals stayed the mandate pursuant with Rule 24(3), Title 28, U.S.C.A.[4a] The United States Attorney filed a "motion to revoke bail" *in the Court of Appeals.* Defendants opposed that motion.[5] The instant motion by the United States Attorney is a resurrection of the motion filed in the Court of Appeals. The instant motion admits that the Court of Appeals overruled the motion.

The United States Attorney invokes Rule 46(a) (2), Federal Rules of Criminal Procedure, as the basis for his motion. He seeks to require defendants to "show cause why bail previously set by this Court * * * should not be revoked." He does not set out grounds for the motion, such as violation of conditions of bail, nor does he set out facts that would urge the Court to consider the matter of bail at this time. Bail should be denied *only in cases* in which, *from substantial evidence, it seems clear* that the right to bail may be abused or the community may be threatened by the applicant's release. *Leigh v. United States,* 8 L. Ed. 2d 269, 271; 82 S. Ct. 994.

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[2] Exhibit "B" annexed hereto.

[3] United States Court of Appeals for the Sixth Circuit, Rule 24(3), Title 28, U.S.C.A.

[4] Exhibit "C" annexed hereto.

[4a] Exhibit "D" annexed hereto.

[5] Exhibit "E" annexed hereto.

The facts in the instant case are *clear* that defendants have been available at all Court proceedings. In fact, it is necessary that defendant, Vincent Serman, directly participate in all proceedings. Further, bail was granted in the first instance by the Honorable Ben C. Green; then on February 1, 1965, this Court sustained a motion for stay of execution of sentence and continued bail pending further appeal. The matter was again passed upon by the Court of Appeals (See Exhibit "D" herein, and Exhibit "A" instant motion). Surely the United States Attorney does not wish to urge upon this Court the untenable argument that the Court of Appeals was not mindful of the requirements of Rule 46(a) (2), Federal Rules of Criminal Procedure, in passing on the defendant's motion to stay the mandate. It is obvious on the face of the record, that the Circuit justices made no finding that the appeal here was not sought in "good faith." Hence, unless it be made to appear that the appeal is frivolous or taken for delay, *bail should be granted.* The criteria by which an application for bail pending appeal are (1) whether the appeal is not frivolous and (2) whether it is not taken for delay. *Leigh v. United States,* 8 L. Ed. 2d 269, 271; 82 S. Ct. 994. Hence, it follows that in a case such as the instant case where the Government does not contend that there is a likelihood that defendants will flee the jurisdiction,[6] that the crime involved is nonviolent, that participation is required by defendants in preparation, and investigation clearly shows that the order permitting bail (by the District Court) and the order staying the mandate (by the Court of Appeals) should not be disturbed without a

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[6] The posture of the case and the ever presence of the defendants at all proceedings also show the defendants' faith in their cause, as well as consistent efforts to ferret out the whole truth of the matter.

strong showing by the Government. The burden should be upon the Government. (cf. *Rhodes v. United States*, 275 F. 2d 78 (1960); *United States v. Piper*, 227 F. S. 735 (1964).)

In defendants' memorandum opposing the Government's motion to revoke bail in the Court of Appeals (Exhibit "E"), the difference between *United States v. Johnson*, 327 U. S. 106 (1946) (the position taken by the Government) and *Remmer v. United States*, 350 U. S. 377 (1956)[7] (the position taken by defendants) shows by one example the probabilities that this case will commend itself to at least four of the justices of the United States Supreme Court.[8]

The Government seems to have lost sight of the amendments to Chapter 207 of Title 18 U.S.C., generally referred to as the Bail Reform Act of 1966, in pushing this matter. (See Barrow Federal Practice and Procedure, Rules Edition, Volume 4, 1966 Pocket Part, page 182.)

> "Three months later, on September 20th, the Bail Reform Act of 1966 became effective. Section 2 of that act says that its purpose is 'to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.'"

The Federal Courts should not become an arena for an unfair "game" where Government forces with prestige,

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[7] There were two *Remmer* cases before the Supreme Court: 347 U. S. 227; 350 U. S. 377. Same parties on two separate appeals as in the instant case.

[8] Jurisdiction of that Court for the instant case is set forth at pages 1-2, Exhibit "A." The questions presented at pages 3-4, ibid.

great weight and a great preponderance of facilities match wits with nearly helpless defendants defending themselves without funds.

Respectfully submitted,

JOHN J. KANE, JR.,
DUFFY & HESSE,
VINCENT SERMAN,
Defendant Pro Se.

TRANSCRIPT OF PROCEEDINGS AT ORAL HEARING ON MOTION TO SHOW CAUSE BEFORE HON. GIRARD E. KALBFLEISCH, JUDGE OF SAID COURT, ON FRIDAY, JULY 14, 1965, AT 9:30 O'CLOCK A.M.

APPEARANCES:

On behalf of the Government:

NATHANIEL R. JONES, *Assistant U. S. Attorney.*

On behalf of the Defendants-Appellants:

MESSRS. KANE, RAY & ELDER, by
JOHN J. KANE, JR., ESQ.

MESSRS. DUFFY & HESSE, by
DAN W. DUFFY, ESQ., and
SYDNEY A. HESSE, ESQ.

* * * * *

(22) The Court: How do you contend, Mr. Kane, that the present status of your case does not fall within the frivolous character or delay of appeal, when the law specifically provides that when a motion for a new trial is filed when a case is pending on appeal in the Circuit Court, that the District Court has no authority unless the case is remanded by the Court of Appeals to the District Court—which was not done in this case.

Now, you are appealing from the fact that I overruled the motion for a new trial on newly-discovered or suppressed evidence.

Mr. Kane: Yes, Your Honor.

(23) The Court: Without an opinion.

Mr. Kane: That is correct.

The Court: Now, the rule is clear and unequivocal, that when a case is on appeal in the Court of Appeals, this Court has no jurisdiction over the case. And unless the Court of Appeals, where your appeal is pending, remands the case for this Court to hear your motion for a new trial—that you are now presently taking to the Supreme Court—I have no jurisdiction at all in it. Now, it is that judgment of mine that you are appealing, which the Court of Appeals affirmed; and you haven't even got a prayer to stand on.

Now, if you will look at the rule, Rule 33 provides:

"The court on motion of the defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly-discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand (24) of the case."

Now, how do you get around that? Have you read Rule 33? Neither one of you cited it to me.

Now, the only reason I am calling it to your attention is that when you people filed this, I naturally felt that it deserved my fullest study and consideration. But I ran immediately head-on into the provision of Rule 33: there

was no remand; there wasn't anything for me to do but to overrule the motion.

Now, perhaps I should have written some memorandum advising counsel before they could get me to rule upon this, they should get a remand from the Court of Appeals. But I don't think I owe the obligation to lead counsel around by the hand.

Mr. Kane: Your Honor please, I was not in this case from the beginning; but my understanding is that the Supreme Court had ruled before the motion for new trial on the ground of newly-discovered evidence was filed in this Court, and that was after the ruling. Therefore,—

The Court: No. Your case was in the Court of Appeals, was it not? Weren't you before the Court of Appeals on a motion for rehearing when the motion for a new trial on newly-discovered evidence (25) was filed in this case?

Mr. Kane: No. No, your Honor, it was—

The Court: Well, I have got another case going.

I will take it under advisement.

I will look into this further, and let the Government have time to file a responsive memorandum to this memorandum which you filed, Mr. Kane.

Mr. Kane: All right. Thank you.

The Court: Mark the cause submitted.

We will recess for five minutes before we resume the other case.

(Recess had.)

* * * * *

RESPONSE TO MEMORANDUM OF DEFENDANTS RE: BAIL REVOCATION.

Now comes the United States of America by and through Merle M. McCurdy, United States Attorney, and Nathaniel R. Jones, Assistant United States Attorney, and with leave of Court, submits the following response to the memorandum of defendants of July 12, 1967.

The United States concedes the accuracy of the narrative in paragraphs one and two of defendants' memorandum with two exceptions, and takes issue with assertions and conclusions throughout same. The United States denies the truthfulness of the representations that 1) the appeal is in good faith, for good cause, and not for purposes of delay; and 2) the government's motion is merely a resurrection of a motion previously filed in and denied by the 6th Circuit Court of Appeals.

The United States takes the position that the defendants' appeals are frivolous, not in good faith, not for good cause, and are for purposes of delay. 1) The government's contention that the appeals are frivolous, etc. is based on the fact that:

A) The judgment of conviction was entered on July 23, 1963. An appeal bond of $25,000.00 was fixed by the trial judge. (See Exhibit A)

B) The Court of Appeals, in November, 1964, affirmed said conviction. Rehearing denied. (Exhibits B and B-1)

C) On May 27, 1965, the United States Supreme Court denied defendants' petitions for writs of certiorari.

D) On October 11, 1965, rehearing was denied by the Supreme Court.

E) Motions for new trials on grounds of newly-discovered evidence filed by defendants in U. S. District Court on October 15 and October 18, 1965. The

cases had not been remanded as of this date. (See Exhibits A, H and I)

F) On December 10, 1965, motions for new trials were, upon consideration, overruled by District Judge Girard E. Kalbfleisch. Cases had not been remanded as of this date and no remand sought by the Court.

G) On December 13, 1965, rulings by Judge Kalbfleisch appealed to the 6th Circuit Court of Appeals on grounds that it was improper to deny same without a hearing.

H) On March 29, 1967, one week before oral arguments, defendants filed a motion with the Court of Appeals asking for an order compelling the United States to disclose whether any electronic surveillance had occurred in the investigation of their cases.

I) The United States immediately responded in the negative on March 31, 1967, with an affidavit by the Asst. United States Attorney. (Exhibit C)

J) Oral arguments heard in the Court of Appeals on order overruling motions for new trials on newly-discovered evidence without hearing, and on the issue of electronic surveillance.

K) On May 5, 1967, the Court of Appeals held that the District Judge had not abused his discretion in denying defendants' motions for new trials and further denied their motion for order of disclosure of electronic surveillance. (Exhibit D)

L) On July 1, 1967, petition for writ of certiorari filed in the Supreme Court.

M) The appeal for which the bond was fixed by the District Judge has been exhausted. The present appeal is separate and distinct from the judgment of guilt which the appellate courts reviewed and affirmed following conviction.

N) Rule 33, F.R.C.P., relating to new trials on grounds of newly-discovered evidence in cases on appeal, restricts the granting of same unless the trial

court first requests a remand of the case, in the event it has not been remanded at the time motions are considered. However, at any time, without requesting a remand, the trial court may overrule the motions.

United States v. West, 170 F. Supp. 200 at 204; *United States v. Comulada,* 340 F. 2d 449 at 452; *Ashe v. United States,* 288 F. 2d 725 at 733.

O) The state of the law is such that when a District Court, upon consideration, overrules motions for new trials on grounds of newly-discovered evidence in cases on appeal, it does it for two reasons:

1) The motions lack merit, therefore no remand is being requested.

2) Lack of jurisdiction.

2) Defendants assert that the United States is merely resurrecting a motion previously filed in the Court of Appeals. Defendants certainly must be aware of the language of the order of the Court of Appeals in this regard. The Court clearly stated that its ruling was without prejudice to it being renewed in the District Court, since this is the Court that orginally fixed the appeal bond. (See Exhibit A of government's Motion to Show Cause.)

District Court's Authority to Revoke Bail.

Rule 46(a)(2) of the Federal Rules of Criminal Procedure confers upon the trial judge authority to continue bail upon appeal. Further, said rule clearly confers upon a judge who sets bail authority to revoke it:

"Any court or judge * * * authorized to grant bail may at any time revoke the order admitting the defendant to bail."

This Court obviously fixed an appeal bond in order that the defendants could remain free to prosecute appeals

of their judgments of convictions. Those appeals have now been exhausted. The appeals presently pending in the Supreme Court are collateral in nature. They are an appeal of this Court's refusal to grant them a hearing on their motions for new trials on grounds of newly-discovered evidence.

This fact brings us face to face with the question of this Court's desire to permit the bail it set for the original appeal to be used during a dilatory and frivolous maneuver by the defendants. In considering that question we note that Rule 46 does not grant a District Judge power to set an appeal bond pending certiorari to the Supreme Court. This is the limiting language of the Rule:

> "Pending appeal or certiorari to the Supreme Court, bail may be allowed by the Court of Appeals or by any judge thereof, or by the Supreme Court or by a Justice thereof."

Significantly, no mention is made of a District Judge in the foregoing quote from 46(a)(2).

It seems clear beyond any doubt that Rule 46 gives the District Court authority to revoke an appeal bond which it previously fixed. However, the Court of Appeals and/or the Supreme Court are given power to fix bail in cases "pending appeal or certiorari to the Supreme Court." Therefore, those courts should be the forums from which bail ought now to be sought by defendants, if indeed, bail is to be fixed.

This brings us to a consideration of the nature of the appeal to determine whether it has a frivolous character.

The government is of the view that the appeal is frivolous and for purposes of delay because the trial court had no jurisdiction to grant the motion for a new trial under the circumstances. At the times the motions were filed and considered, the cases had not yet been remanded

to the District Court. In considering the motions, the Court concluded, among other things, that they were lacking in merit. If they had been meritorious the Court would have sought a remand from the court before whom the cases were pending in order to grant the motions. (See opinion by J. Weick in *West v. United States, infra.*) No such procedure is required to overrule this type of motion in cases not yet remanded.

The Court will note from the brief filed in the Court of Appeals by the United States (Exhibit F) that the position was taken that the same judge to whom the motions for new trials had been submitted, was the same one who presided at the trial. He was in a position, therefore, upon considering the motions on their faces, to evaluate the assertions therein and to grant them as valid or reject them as invalid. The Court rejected them. The Court of Appeals held that this rejection did not constitute an abuse of discretion. (See Exhibit D.) In view of the foregoing, the United States concludes that the appeals, the effort to remain free on bail pending an ultimate determination of them, are geared solely for delay. The District Court has every justification as well as authority to revoke the bail which it set at the time of conviction. Should the Supreme Court feel that the defendants should be free on bail, then that Court or a Justice thereof is empowered to fix bail.

The orderly administration of justice requires that defendants not be permitted to carry on an endless series of collateral attacks upon their judgments of conviction, and then use pendency of those proceedings as justification for remaining at large. There is nothing about the petition for writ of certiorari that entitles the defendants to remain free on the original appeal bond. (See Exhibit G—C.A. Order, *United States, v. Hoffa.*) The Supreme Court will act on the basis of the record already made and

the pleadings submitted. Therefore, defendants have no role to play. Defendant Serman argues that he must "directly participate in all proceedings." He failed to state the reasons calling for his direct participation, or the nature and degree of such participation. This assertion is open to challenge in view of the fact that defendant Serman has been to this point represented by three counsel.

Defendants in their memorandum suggest that the Court of Appeals must have been mindful of Rule 46(a)(2) when it stayed the mandate and that, therefore, this Court should not revoke the bail. In reply, we again cite to the Court the language of the Court of Appeals order in directing that the question of bond revocation be first presented to this Court. (See Exhibit A—Motion for Show Cause Order.) It cannot therefore be said that the Court of Appeals has foreclosed action by this Court.

Defendants argue the proposition that this Court is practically enjoined by decided cases from disturbing the bail it previously set. Such a proposition is fallacious, borne of mis-reading or a non-reading of 46(a)(2). The *Rhodes* and *Piper* cases cited by defendants do not deal with the situation we have here. Those decisions treat instances of post-conviction bail, not cases where convictions have been affirmed. The *Remmer* cases, also cited, are not relevant to the instant question. Those cases involve a matter of a juror being interrogated by the F.B.I. during the recess of the trial. That factual and legal proposition has no pertinence or relevance to the issue here.

The Bail Reform Act referred to by defendants in their memorandum contains no predicates upon which defendants at this stage can rely. That Act is designed to assure that persons not be lodged in jail before adjudication of their guilt. The Act is not aimed at freeing forever persons who have unsuccessfully exhausted appeals of

their judgments of conviction, and who choose to unleash an endless barrage of collateral attacks. Defendants have every right to mount those attacks, but they should be done from jail—not while at large under bail which was not fixed for that purpose.

Conclusion.

The Court is respectfully urged to exercise its powers under Rule 46(a)(2) and revoke the bail which it set in CR 63-50 at the time of their conviction in July, 1963, for the reason that they are using that bill to delay and prolong, through means of frivolous appeals, the conclusion of their cases. Their convictions have been appealed and affirmed. As of this moment the defendants stand convicted of the crimes charged. There is no presumption of innocence operating in their favor any longer.

Therefore, this Court should terminate the bail previously set for the appeal since that appeal has been exhausted.

Respectfully submitted,

MERLE M. MCCURDY,
United States Attorney,

By NATHANIEL R. JONES,
Asst. U. S. Attorney.

LETTER, JULY 27, 1967, JOHN F. DAVIS, CLERK, TO HON. THURGOOD MARSHALL.

July 27, 1967

Hon. Thurgood Marshall
Solicitor General of the U. S.
Washington, D. C.

Re: Serman & Strollo v. U. S.
No. 320, Oct. Term, 1967

Dear Mr. Marshall:

The request contained in your letter of July 25, 1967, for an extension of time to file a response to the petition for writ of certiorari in the above entitled case has been granted and the time extended to and including September 1, 1967.

Very truly yours,

JOHN F. DAVIS, *Clerk*,
By E. P. CULLINAN,
Chief Deputy.

EPC: njf
CC: Mr. John J. Kane, Jr.
1405 The Superior Bldg.
Cleveland, Ohio 44114

LETTER, AUGUST 7, 1967, JOHN J. KANE, JR., AND DAN W. DUFFY TO HON. G. E. KALBFLEISCH.

KANE, RAY AND ELDER
The Superior Building
Cleveland, Ohio 44114
August 7, 1967

The Honorable G. E. Kalbfleisch
Judge, United States District Court
Northern District of Ohio
Eastern Division
Federal Building
Cleveland, Ohio 44114

In re: United States of America
v. Lenine Strollo and
Vincent Serman
No. CR 63-50

Dear Judge Kalbfleisch:

Some clarification of the United States Attorney's "response" is in order.

When the Supreme Court of the United States denied rehearing on October 11, 1965, that was the final judgment under Rule 33 of the Federal Rules of Criminal Procedure.

No mandate issues. See Supreme Court Rule 59(3).

No remand can be entered or requested by any court after final judgment.

Since the final judgment was entered by the Supreme Court of the United States on October 11, 1965, the motions for new trial on the grounds of newly discovered evidence filed on October 15, and 28, 1965, were timely and within the two years under Rule 33 of the Federal Rules of Criminal Procedure.

If a case is on appeal, a motion on the grounds of newly discovered evidence can be *granted* only on remand. *Richardson v. United States*, 360 F. 2d 366 (C. A. Ala. 1966). If the development for the grounds for the motion occur in the Court of Appeals, the procedure, as outlined in *United States v. Smith*, 331 F. 2d 145 (6th Cir. 1964), must be followed.

The erroneous statement with reference to remand, as set out by the United States Attorney in Item 1)F) of his "response," should be disregarded.

The word "remand" is defined by the Supreme Court of the United States in *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373:

> "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points."

The United States Attorney's office contends the cases are pending too long, and the appeal lacks merit, and then the United States Attorney proceeds in paragraph 3, on page 4 of his "response," to state his only reason why the appeal is frivolous. A careful reading of paragraph 3 leads one to believe that the Government is attempting to mislead the Court for the reason that each of the statements alleging frivolity is erroneous and not in conformity to Rule 33 of the Federal Rules of Criminal Procedure or annotations thereunder. A frivolous appeal presents no justiciable question * * * and so recognized as devoid of merit.

There was attached to and made a part of the motion for new trial a sworn statement of Mrs. Socie before an

official court reporter.* Also, and of utmost importance, a request for an oral hearing was made in the motion for new trial "so that testimony in support of this motion may be presented."

In *Remmer v. United States*, 347 U. S. 227, 229 (1954), a motion for new trial on the grounds of newly discovered evidence was filed requesting a hearing. The Supreme Court said at page 229:

> "The Government did not file answering affidavits. The District Court without holding the requested hearing, denied the motion for a new trial. * * * The trial court should not decide and take final action ex parte on information such as was received in this case, * * *."

The defendants in this case sincerely believe that the charges against the named detective, unanswered by the Government, as well as the other unanswered charges in the motion for new trial supported by the record transcript, require a hearing.

The standing of the defendants in this case is further buttressed by another Supreme Court case, *Surowitz v. Hilton Hotels Corp.*, 383 U. S. 363 (1966). (A civil stockholder's derivative suit summarily dismissed by the District Court despite the fact that affidavits had been filed explaining pre-investigation.):

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* Mrs. Socie's husband and a defendant, John Paladinich, are named as the source of the counterfeit money. Detective Bernat who testified at the trial took a statement from Mr. Socie before the trial, but did not divulge that information. Defendant, John Paladinich, testified he had not had any intimation of consideration for testifying. After the trial, John Paladinich was placed on probation.

Detective Bernat, although available, never signed or filed a counter-affidavit. Since the filing of the sworn statement of Mrs. Socie, Detective Bernat has continually followed her and had her detained by the police in Warren, Ohio, but never had her arrested. To avoid harassment, Mrs. Socie left this district.

"We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion."

This limited note is not to be considered as approving any part of the "response." The Court of Appeals in this case did *stay the mandate.*

Respectfully submitted,

JOHN J. KANE, JR.,
DAN W. DUFFY,
Attorneys for Defendants.

MEMORANDUM AND ORDER RE: MOTION TO SHOW CAUSE WHY BAIL SHOULD NOT BE REVOKED.

(Filed October 6, 1967.)

KALBFLEISCH, *Ch.J.*

Judgments of conviction of defendants were entered by this Court July 23, 1963 and defendants subsequently appealed unsuccessfully to the United States Court of Appeals for the Sixth Circuit, which affirmed their convictions and later denied rehearing. The Supreme Court of the United States denied defendants' petitions for writs of certiorari on May 27, 1965 and on October 11, 1965 denied rehearing.

Defendants' post-appeal motions for new trials on grounds of newly discovered evidence, filed October 11 and 18, 1965, upon consideration, were overruled by an order of this Court entered December 10, 1965. That

denial was affirmed May 5, 1967 by the United States Court of Appeals for the Sixth Circuit. Defendants' petitions for writs of certiorari filed July 1, 1967 as to these orders are presently pending before the Supreme Court of the United States.

On July 14, 1967, the instant matter came on for hearing upon the Court's order of July 7, 1967 that defendants show cause why bail previously set by this Court pending defendants' appeal should not be revoked.

At the conclusion of the July 14, 1967 hearing the Court inquired of counsel regarding its jurisdiction to decide the original motions for new trials, the Court's purpose being to aid its recollection of the state of the proceedings since bail was originally set. It has come to the Court's attention that counsel for the defendants apparently perceives in that inquiry a potential avenue for a new ground for appeal of the Court's overruling the motions for new trials, when in fact the question posed by the Court was an aside of a purely rhetorical and academic nature only. The Court is therefore constrained to clarify its ruling on the motions for new trials for the benefit of counsel and the record.

At the time defendants' motions for new trials were submitted, the Court's thorough consideration of defendants' moving papers and exhibits compelled the Court to conclude that such motions were utterly without merit and that new trials were not warranted. Under such circumstances, a hearing on the motions would have served no useful purpose and was clearly unnecessary. The Court's decision on the motions for new trials was not predicated upon any doubt as to its jurisdiction to decide such motions.

In the matter presently before the Court, defendants have asserted by brief and argument of counsel that their

petitions for certiorari presently pending before the Supreme Court are not frivolous or for purposes of delay and that the community will not be threatened by their continued release on bail.

The defendants have been available at all court proceedings thus far. The record does not show any finding by a judge in any foregoing proceeding in this case that defendants' appeals to date have not been taken in good faith.

The United States Attorney, upon whose motion the Court's order of July 7, 1967 was entered, has not shown that defendants have violated the conditions of their bail; that the pending appeal is frivolous or for the purpose of delay; or that defendants' continued release will be a threat to the community.

Therefore, defendants' bail will be continued pending disposition of their petitions for writs of certiorari by the United States Supreme Court.

GIRARD E. KALBFLEISCH,
Chief Judge.

IT IS SO ORDERED.

GIRARD E. KALBFLEISCH,
Chief Judge.

Date: October 6, 1967.